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DE LA

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DE LA

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COMPRENANT LA

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DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL.
PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieur de Montréal, docteur en droit, doyen et professeur de Droit Civil à la Fasulté de Droit de l'Université Laval à Montréal

TOME XXIII

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ABRÉVIATIONS.

- P. D. T. M.: Précis des Décisions des Tribunaux du district de Montréal
- 1854, pa. T. K. RAMSAY et L. S. MORIN, avocats.
 D. T. B. C.:—Décisions des Tribunaux du Bas-Canada, en 17 volumes, commencées en 1851, par MM. Lelièvre, Angers, Beaudry et Fleet, avocats.
- J.: Lower Canada Jurist.
- L. C. L. J .: Lower-Canada Law Journal.
- R. J. R. Q.:—Rapports Judiciaires Revisés de la province de Québec par le juge Mathieu. R. C.:—Revue Critique.
- R. L.:—Revue Légale. C. C.:—Code Civil du Bas-Canada.
- C. M.:—Code Municipal du Bas-Canada.
 C. P. C.:—Code de Procédure Civile du Bas-Canada.
 S. R. Q.:—Statuts Refondus de la Province de Québec.
 C. B. R.:—Cour du Banc du Roi ou Cour du Banc de la Reine.
 C. S:—Cour Supérieure du Bas-Canada.

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CAPIAS .- PROCEDURE.

COURT OF QUEEN'S BENCH, Quebec, 6th December, 1873.

Coram Duval J. en C., Badgley, J., Monk, J., Taschereau, J. Ramsay, J.

THE MOISIC IRON COMPANY, appellant, and OLSEN alias JACOBSEN, respondent.

Held:—1. That the president of an incorporated company is competent to make the affidavit for a capias under Art. 798, C. P.

2. That the affidavit may be sworn before the Deputy Prothonotary.

3. That the following form of the Judge's Order required by Art. 801

C. P., is sufficient: "Seeing the foregoing affidavit, the amount of bail to be given under Article 801 of the Code of Civil Procedure is hereby fixed at."

4. That the writ of capias, as to its execution on a Sunday, is not governed by Art. 786 C. P.

5. That the affidavit is not bad because it states that the debtor is about to leave the Dominion of Canada," when it can be gathered from the other allegations of the affidavit that the departure is really from a

point within the limits of the former Province of Canada.
6. That it is not necessary that it should be positively sworn that at the time of the making of the affidavit the debtor is actually within the limits of the former Province of Canada.

7. That damages claimed for the breach of a contract made in Norway, but to be executed in the Province of Quebec, do not constitute "a debt created out of the Province of Canada." (Art. 806 C. P.)

This was an appeal from a judgment rendered by the Court of Review, at Quebec (MEREDITH, CH. J., and CASAULT, J., TESSIER, J., dissentiens), confirming a judgment rendered by the S. C., at Quebec, the 2nd July, 1873, (STUART, J.) which granted a motion to quash a capias ad respondendum issued by appellant against respondent. The questions raised in the different courts sufficiently appear in the remarks of the judges in each court.

STUART, J.: (In the S. C.) In this, and in sixteen other cases identically situated, motions are made by defendants to TOME XXIII.

be liberated from custody, and to quash the writs of capias. Before entering upon the objections so well put by the counsel of defendants, I shall refer to the conditions upon which the remedy of a capias ad respondendum is allowed by law to a plaintiff. The Code of Civil Procedure enacts, Art. 798: This writ is obtained upon an affidavit of the plaintiff, his book-keeper, clerk, or legal attorney, declaring that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding \$40, and that the deponent has reason to believe and verily believes, for reasons specially stated in the affidavit, that the defendant is about to leave immediately the Province of Canada, with intent to defraud his creditors in general, or the plaintiff in particular, and that such departure will deprive the plaintiff of his recourse against the defendant." Art. 806: "A writ of capias cannot issue for any debt created out of the Province of Canada, nor for any debt under \$40." Having given the text of the law, I shall now give the substance of the affidavit impugned, that non-professional, equally with professional gentlemen, may understand the question at issue, on a subject of such general interest as that of the remedy of imprisonment conferred on the creditor in certain exceptional cases against his debtor. The affidavit is made by Molson, who takes, as his addition, President of the Moisic Iron Company, a body politic and corporate, having its principal place of business at the City of Montreal: he makes oath that "K. Olsen is personally indebted to the Moisic Iron Company, in the sum of \$293, for that, whereas, at Christiana, in Norway, in April last, it was agreed between K. Olsen and the said Company that Olsen should serve the Company in such capacity as the Manager of the same might deem expedient, at the current rate of wages, for the term of one year from the date of his arrival at the works, to wit, at Moisic; and Olsen, then and there, acknowledged that he was indebted to the Company in the sum of \$93.69, advanced to him for the payment of his passage, with his family, and for the purchase of provisions for the voyage;" that he entered the service, and, subsequently, left it without cause and against the directions and orders of the managers and officers of the Company to their damage of \$293. The affidavit then proceeds: "This deponent further states that he has reason to believe and verily believes that Olsen is about immediately to leave the Dominion of Canada, with intent to defraud the Moisic Iron Company, and, for reasons of his said belief, this deponent saith that Olsen joined with others, at Moisic, in resisting the lawful commands of the manager and officers of the Company, and, with menaces, demanded his discharge,

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and struck work, and, afterwards, left Moisic in a schooner, with a great number of others, the said party leaving declaring that they were going to join their friends in Chicago, in the United States; that Olsen, by so leaving the service of the Company, with the others to the number of fifty, or thereabouts, has caused a stoppage of the works of the Company." The defendant's objections to this affidavit are numerous, and may be classified into substantial and technical objections. I shall first consider the substantial objections: The affidavit on its face, does not appear to have been made by any of that category of persons which the law requires should make it; it is not made by the plaintiff's book-keeper, clerk, or legal attorney. Molson does not say that he bears any of these relations to the Company, he does not even swear that he is president of this Company, though that would not better matters, but simply assumes that addition. A man does not swear to the truth of his addition, and perjury could not, therefore, be assigned, if such addition were false. The business of every Corporation is transacted by a special body, or board of directors, and the acts of such body or board evidenced by a legal vote are as completely binding upon the Corporation and as complete authority to their agents as the most solemn acts done under the Corporate seal; individually, the directors, in no sense, represent or bind the Company; if there be a vote of the board of direction of the Moisic Iron Company, naming Molson the legal attorney of the Company, then he would have been authorized to take this affidavit, and it is to be regretted that he did not assume a quality he possessed and comply with the law, but if he has no other authority than that derived from being president to justify his making it, then he had no more power than any other director, and a director has no more power than the merest stranger, that is, no power at all; and the arrest in this case is not shewn to be the act of plaintiff. I have been thus explicit in expressing my opinion, because the objection is a substantial one, and I should regret if it were looked upon as a technical one. But, quite irrespective of the powers of a president, the law directing that the affidavit shall be taken by certain persons only, exclused all other persons from the right of doing so, and the person taking the affidavit, in this and all like cases, should be the book-keeper, clerk, or legal attorney of the plaintiff, and should assume the quality on the face of it. Where an act authorizing a creditor to redeem, required an affidavit of the amount due to be made by the creditor or his agent, it was held the affidavit must state, in express terms, that the deponent

was agent, and merely naming him as such in the affidavit would not answer. It would be easy to refer to authorities to show that Judges have no power of extending the meaning of a Statute beyond its words, and deciding by the equity and not the language; but there is enough in the law itself to show that the Legislature wisely intended to leave nothing to interpretation, nothing to the discretion of Judges. It names all the category of persons who shall give the evidence upon which this extraordinary remedy shall rest: thus, in designating the book-keeper it did not conceive that that would include another description of clerk, and hence it confers the power on the clerk, nor that these designations could be held to include a legal attorney. All latitude of interpretation appears to me to be guarded against in the law itself—and in the whole course of my experience, dating back to a time when our Courts were presided over by very eminent men, I know of no case in which the language of the law was not insisted upon by our Courts, as essential to the validity of affidavits of this nature, except the case of affidavits taken by cashiers of banks, in which it was held that a cashier is by law the legal attorney of his bank—this is the only exception. It would be extraordinary if at this late day, I were to hold that the bar, with the law under their eyes, were not bound to adopt its language. Could anything else be expected to follow from my doing so, than confusion and distrust of the Courts? There is nothing but what is right and legal in saying that the language of the law shall be used, and that no equivalents and still less terms broader or more limited shall be admitted. As long as I have the honor of occupying a seat on this Bench, I shall obey the law by requiring in such affidavits that the terms it prescribes and no others shall be used. The next question is of the same nature as the last. After mentioning who shall take such affidavits, the law, plainly and explicitly, pre-cribes that the deponent shall swear that the person proceeded against is about to leave immediately the Province of Canada with a fraudulent intent. deponent swears that the party is about immediately to leave the Dominion of Canada; this again is a departure from the language prescribed and that is enough, and it is as wide a departure from its meaning. There is no law that justities this affidavit. It is further objected to this affidavit that no sufficient reason is given for believing that the defendant was immediately about to leave the Dominion of Canada, "and for reasons for his belief this deponent saith that K. Olsen joined with others at Moisic aforesaid in resisting the lawful commands of the manager and officer of

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the company, and with menaces demanded his discharge and struck work." So far the affidavit swears to the resistance of lawful commands without specifying what these commands were. If this allegation is material it ought to have stated the commands that the Court might judge of their lawfulness, but in truth neither this fact nor that of their leaving Moisic have any bearing upon the objection taken; whether the defendant's departure gives the plaintiff any recourse against him will depend upon the legality of his hiring according to the laws of Norway, and perhaps upon the manner in which the company fulfilled towards him the obligations they have contracted; but there is nothing so far to justify the conclusion, that when leaving Moisic the defendant intended to go beyond the limits of the Dominion of Canada. The affidavit proceeds, "and, afterwards, left Moisic in a schooner with a great number of others, the said party leaving, declaring that they were going to join their friends in Chicago, in the United States." This then is the reason. That defendant should be held responsible for what he said himself is quite intelligible, but that the defendant, by entering a schooner to come to Quebec, should be liable to imprisonment here because a party on board said they were going to join their friends in Chicago seems to me no reason at all. Either defendant was one of the party who said they were going to Chicago, and then the affidavit should have boldly and frankly stated the fact, or it was the others who said so. As identically the same affidavit is made in all the cases before me, it follows that not one of them said he was going to Chicago, or rather is sworn to have said so. As the schooner is represented as containing some fifty persons, there were thirty-three persons who may have said they were going to Chicago, and who, in so far as it appears, were permitted to go unmolested by the plaintiff. This loose, elastic assertion seems to me wholly insufficient to ground an arrest of the defendant. According to law a capias can only issue for a debt created in the Province of Canada, or rather the law says that no capias shall issue for a debt created outside of the Province of Canada. Does the affidavit in this case show a debt upon which the capias can issue? It alleges an agreement between the plaintiff and defendant, without saying how and by means of whom the plaintiff bound himself in this agreement, by which the defendant was to serve the Company at the current rate of wages, for the term of one year from the date of his arrival at Moisic; and that the defendant then and there, that is in April, and in Norway, acknowledged he was indebted to the said Company in a sum of \$93.69, advanced to him for the

payment of his passage and for the purchase of provisions for the voyage. It is not stated whether such contracts were in writing or verbal, nor in any form binding on the defendant by the laws of Norway. Two contracts are sworn to have taken place—one a contract of hiring for a year, the other a loan of money. The object or motive for the loan in no way affects its nature. As to the loan, the money was advanced in Norway, and the acknowledgment was given there—no promise of repayment anywhere or at any time is alleged to have been made by the defendant. The effect or value of said acknowledgment will be regulated by the laws of Norway, all the legal consequences attach to it according to that law, thus with reference to \$93.69 it is a claim to recover back so much money lent to the defendant in Norway, and for this sum as well as the damages the defendant is now detained by capias. I cannot believe that there can be any two opinions that for the recovery of this amount the law expressly denies the plaintiff the right to issue a capius at all. As to the damage claimed by plaintiff for breach of the alleged contract of hiring, and which the Judge fixed for the purposes of the arrest in the cause at \$50, where was that created? It may as well be stated emphatically there can be no conflict of laws in the present case, because the question is as to the remedy. and that is regulated by the laws of the country where it is resorted to. So that the question is, do the laws of the Province of Quebec admit of a capias issuing in an action for breach of a contract entered into in Norway? The right of plaintiff to damages rests upon a legal contract, according to the laws of Norway. If the contract is not binding on the defendant by those laws, this action must fail from want of foundation. An action for breach of contract is an action to enforce a contract. This, then, is an action to enforce a foreign contract. Such an action lies in the Courts of this country, but our law says that in such an action no capias shall issue. The plaintiff's right of action was not created in this country, though he seeks to enforce it here (1). Whenever this case comes up on the merits, this Court will be called upon to say whether by the laws of Norway defendant did or did not bind himself to serve plaintiff for the space of a

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⁽¹⁾ Fœlix, Droit International. "La question de la légitimité de l'engagement, celle de savoir s'il y a lieu d'accorder ou de refuser l'action résultant d'un contrat doit être également appréciée suivant la loi du lieu où le contract a été passé. Le principe général en cette matière est que les parties contractantes ont eu l'intention de se conformer dans leurs conventions, à la loi du lieu où celles-ci ont été consenties, et sont devenues parfaites, et par suite de les soumettre à cette loi ; en d'autres termes, que la validité intrinsèque, la substance du lieu (vinculam juris) des conventions, dépend de la loi du lieu où elles ont reçu leur perfection, l'acte valable ou nul d'après cette loi, l'est également partout."

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year. Can that be an action created in the Province of Canada? If it should be found that the defendant is bound, then the foreign contract is vindicated by awarding damages. I think that the present action is to enforce a foreign contract, and that no capias can issue in such. Reference has been made to the decisions of our Courts on the question of cause of action, and they are uniform that cause of action is combined of the promise and of the breach, hence when the promise was in one district and the breach in another the Court has been held to be without jurisdiction in either district, and the plaintiff was referred to the domicile of the defendant. Applying these decisions as far as they have any application to the present case, was not the promise and undertaking to serve made in Norway, and did not the breach occur here? Then the cause of action has not arisen in this Province if the decisions adverted to are based on reason and law. I am irresistibly drawn to the conclusion that not in one essential particular only, but in every essential particular the affidavit in this case is faulty and insufficient, it was not made by the book-keeper, clerk or legal attorney of the plaintiff, it does not swear that the defendant is about immediately to leave the Province of Canada—it does not contain sufficient reasons for swearing that the defendant was about leaving—and lastly it shows clearly that the debt sought to be recovered was not created in the Province of Canada, but was created in Norway. The principal technical objections are: That the Prothonotary had no authority to issue the writ; That the arrest was made on a Sunday, without there appearing any authority to justify this; That no order for the issuing of the writ was ever granted by any Judge, and without such the writ could not legally issue. I am far from thinking all of these objections without any foundation, but as I am with the defendant upon other grounds. I shall not express an opinion upon these. The questions submitted are in my apprehension neither complicated nor difficult of solution. The law governing the matter is one prescribing forms of procedure, and in regard to these the maxim is non observata forma infertur adnullatio actus—the procedure, whatever it is, required by law, it is our duty rigidly to exact, the restriction strictly to insist on, without regard to the facts or the hardship of the case. The intention of the Legislature controls absolutely the action of the judiciary, and if such intention is clearly shown, as in this case, the Courts have no other duty to perform than to execute the Legislative will. No rule is more firmly established and acted upon than that which declares when a law is plain and unambiguous, whether it is expressed in general or limited terms, the Legislature shall be intended

to mean what they have plainly expressed, and the Judges should not arrogate to themselves a dispensing power where the Legislature has spoken. Assuming the power of extending the meaning of a statute beyond its words, and deciding by the equity and not by the language, is exercising legislative functions, it is virtually repealing the law and enacting There exists no such power in the judiciary. I am called upon, with a law before me prescribing who shall make oath and what shall be sworn to, to say whether the affidavit in this cause contains these requirements. I find it impossible to say that it does, and I must, as a necessary consequence, order the enlargement of the defendant. The following was the written judgment in the Superior Court: "The Court, having heard the parties upon defendant's motion, for that the writ of capias ad respondendum issued be declared null and void, and set aside with costs distraits: doth grant said motion, and, thereupon, the writ of capias ad respondendum is declared illegal, null and void, and set aside and quashed." The judgment in Review was as follows: "La Cour, considérant que la déposition sous serment, sur la production de laquelle a été obtenu le bref de capias ad respondendum ne contient pas l'énonciation que le défendeur était sur le point de quitter immédiatement la partie de la Puissance du Canada formant ci-devant la Province du Canada, et que les termes dont on s'y est servi ne comportent pas l'affirmation de ce fait, le jugement en première instance, savoir, le jugement susdit rendu par la Cour Supérieure siégeant à Québec, annulant le bref de capias ad respondendum émané en cette cause, est confirmé. Dissensiente, l'honorable juge TESSIER."

TESSIER, J.: (In Review), dissentiens. The facts disclosed by the affidavit of William Markland Molson, President of this Company, a body politic and corporate, are: that, on the 15th April, last, at Christiana, in Norway, it was agreed between defendant and the company, that defendant should serve the Company for the term of one year, from the date of his arrival at the works, to wit, at " Moisic: that defen-"dant, then and there, acknowledged that he was indebted " to the Company for the sum of \$133.00 advanced him for "the payment of his passage, and for the purchase of provi-" sions for the voyage." It is further stated, in the affidavit, "that defendant proceeded to Moisic, and there entered the " service of the Company, on or about the 29th May last, in " the capacity of workman, and that defendant did not, nor " would on his part perform the said agreement, or continue " his services to the Company, but, without reasonable cause, " left the service of the Company, on or about the 9th June "then instant, to the damage of the Company of \$323." The

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deponent further stated that he had reason to believe, and verily believed, that defendant "is about to leave immediately "the Dominion of Canada, with intent to defraud the Com-" pany; That he joined with others, at Moisic in resisting "the lawful commands of the manager and officers of the "Company, and, with menaces, demanded his discharge, and " struck work, and afterwords left Moisic in a schooner, with "a great number of others, the party so leaving declaring "that they were going to join their friends in Chicago, in the "United States; that, by so leaving, with the others, defen-"dant has caused stoppage of the works of the Company." The defendant has moved to quash this writ of capias for several reasons. 1st. That the debt upon which the capias is issued is a foreign debt, and, if it is so, by article 806 of our Code of Procedure, the writ of capias does not lie. decide this question, it is necessary for defendant to establish that the whole cause of action has originated in a foreign country, or that the debt which is claimed has been created in a foreign country; because the principle laid down in this article is an exception to the general rule. The performance of the contract was to be in Canada, and it must be presumed that for this purpose the parties intended to submit themselves to the laws of the country where the performance of the contract was to take place. The defendant has fulfilled that part of the contract by which he was to leave Norway and come to Canada; once in Canada, he began to perform the essential part of the contract, which was to work at Moisic for the Moisic Iron Company: and it is the performance, or non-performance, or bad performance, of this contract in Canada, that has given rise to the claim of the plaintiff, for which he seeks a remedy allowed by the laws of this country where the contract had to be performed. The passage money and purchase of provisions was not money lent, but money advanced to be credited on account of the work to be performed by the defendant; the affidavit states, "that the defendant then and there acknowledged to owe that sum;" the other sum is for direct damages on account of leaving the works, but the whole is claimed in this affidavit as of damage to the plaintiffs to the amount of \$333.00. By order of the Judge, the amount for which bail could be given by the defendant was reduced to \$183.00. This rule, that the debt is created in the country where the performance of a contract is to take place, and that the remedy is governed by the laws of that country, appears to be generally admitted. Bonjean, Traité des actions, vol. 1, page 6: "Toute action suppose la violation consommée ou imminente d'un droit. Idem, page 12 : " Le droit, etc." Story, "Conflict of laws, no 280." "The rules already considered

" suppose that the performance of the contract is to be in the " place where it is made, either expressly or by tacit implica-"tion. But where the contract is, either expressly or tacitly, " to be performed in any other place, there the general rule " is in conformity to the presumed intention of the parties "that the contract, as to its validity, nature, obligation, and "interpretation, is to be governed by the law of the place of " performance. This would seem to be a result of natural "justice; and the Roman law has adopted it as a maxim: "Contraxisse unusquisque in eo loco intelligitur, in quo " ut solveret, se obligavit,' and again, in the law, 'aut ubi quis-" que contraxerit : contractum autem non utique eo loco in-" telligitur, quo negotium gestum sit; sed quo solvenda est " pecunia.' The rule was fully recognized and acted on in a " recent case by the Supreme Court of the United States, " where the Court said that the general principle in relation " to contracts unde in one place to be executed in another " was well settled, that they are to be governed by the laws " of the place of performance." Pothier, Traité du change, This principle has been recognized in our jurisprudence. In the Superior Court, at Montreal, Macdougall vs. Torrance, 5 L. C. J., p. 148; 8 R. J. R. Q., p. 137. et 20 R. J. R. Q. p. 145. Held by Mr Justice Monk: That a debt arising out a of contract made in Scotland to deliver passengers' luggage in the port of Montreal, and where delivery failed to be made, is not a cause of civil action which has arisen in a foreign country, and in this case a capias ad respondendum issued against the body of the defendant was maintained. The other rule is that the whole cause of action must have been created in Norway. In the case of Warren vs Kay, 6 L. C. Reports, page 492; 5 R. J. R. Q., p. 153, et 12 R. J. R. Q., p. 246, it has been held, (Justices MEREDITH and BAD-GLEY,) that cause of action means the whole cause of action. And, in Rousseau vs Hughes, 8 L. C. Rapports, page 187; 6 R. J. R. Q., p. 203, et 12 R. J. R. Q., p. 246, the same rule was maintaine by Judges Meredith, Morin and Badgley. In that case, the learned Chief Justice MEREDITH cited an English case, 29 Eng. Law and Equity Reports, 269, in which Judge MAULE observed "Everything that is requisite to show the action to be maintainable is part of the cause of action." Although the question mooted in these cases was in reference to the jurisdiction of the County Court in England, it bears analogy to the present rule, which is also an exception to the common law; therefore the whole cause of action, or the whole debt, must be created in a foreign country, to give the benefit of the exception to the defendant; it appears to me clear that the whole debt was not in the present case created in Norway.

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2. The other objections are more technical than substantial; among them is the objection that the affidavit is made by Wm. M. Molson, President of the Company; it is admitted that a single clerk of the plaintiff could make legally this affidavit; a fortiori, the President who is one of the Members and Directors of this Incorporated Company. 3. Upon the other technical objections, I believe the members of the Court are unanimously of opinion to reject them; I will, therefore, now limit myself to one upon which I differ from the other learned members of the Court. The objection is that the deponent swears that the defendant is about to leave the Dominion of Canada, instead of swearing that the defendant is about to leave the Province of Canada, or what formerly constituted that Province, Lower and Upper Canada. This objection appears to me to be purely technical, and unless the words "Province of Canada" are essential (sacramentels) the term "Dominion of Canada," clearly comprises the old Province of Canada; and the writ issued cannot be executed but within the limits of the Province of Quebec. How can the defendant complain if the plaintiff alleges on his oath more than is necessary? How is it prejudicial to the defendant? The whole context of the affidavit must be considered, and is it not a necessary conclusion from the facts therein sworn to, that the defendant is about to leave that part of the Dominion of Canada, formerly known as the Province of Canada? It is stited in this affidavit: 1. That the defendant was lately residing at Moisic, District of Saguenay, (judicially known as being within the old Province of Canada. 2. That on the 29th May, last the defendant entered the service of the plaintiffs at Moisic. 3. That on the 9th June, without reasonable cause, he left the service of the Company, joined with others "at Moisic, struck work, and afterwards "left Moisic in a schooner with a great number of others, the " said party so leaving declaring that they were going to join "their friends in Chicago, in the United States;" this affidavit is sworn to on the 21st June, that is to say 12 days after the departure of defendant from Moisic in a schooner. Can there be any doubt that he was leaving the old Province of Canada, and even the Dominion of Canada, to go to the United States? What other idea can be conveyed to the mind of any one then, that there he intended to go: But it may be said that swearing that the defendant was about to leave the "Continent of America" would be insufficient; this may be, but it would then be so only because the Continent of America, although well known to us historically, is not judicially, known to us, while "Dominion of Canada" are the words used in our laws; and in the same way as the old

Province of Canada was substituted to the United Provinces of Lower Canada and Upper Canada, in matters of capias, and almost everything else, the Dominion of Canada is now substituted to all the Provinces included in the Confederation. The principle of law which ought to guide in this case is a general principle found in our own code, that a nullity is not presumed, "les nullités ne se présument pas." There is no positive rule existing to the effect that it is necessary to swear that at the specific time when the affidavit is made, the defendant is still within the limits of the old Province of Canada; it would even be very often impossible, because, with our easy means of communication, a fraudulent debtor may reach the frontier line in a few hours. Supposing even that the defendant in the present case should have gone from Moisic to New Brunswick, with intent of passing through Canada to reach the United States and that he was in New-Brunswick on the day the affidavit was made; I maintain that the affidavit would still hold good, and the defendant subsequently arrested in Lower Canada, en route to the United States, would be well and legally arrested. Our Code of Procedure, article 20, is clear as to technical formalities: "In any "judicial proceeding it is sufficient that the facts and con-"clusions be distinctly and fairly stated, without any parti-" cular form being necessary, and such statements are inter-" preted according to the meaning of words in ordinary lan-"guage." It appears to me to be the more conclusive that the quashing of a writ of capias ought to be pronounced only because of positive infringement of our laws of procedure, since these laws indicate a summary and clear mode of contesting the facts sworn in the affidavit, which mode could have been easily followed during the three months which have nearly elapsed since the arrest of the defendant; and it applies in the words of article 819 cf Code of Procedure, " If the essential allegations of the affidavit upon which the capias is founded are false or insufficient;" with this enactment of our Code, technical objections ought to have less weight than they might have had formerly here and in England. Every protection must be given to the liberty of the subject, but protection must also be given to our own subjects against the fraudulent intentions of emigrants who have their passagemoney paid from their own country, and, once in Canada, after eight days' work, combine to strike work, pocket the advances made, and move off to the United States, to the great prejudice of Canadian industry, without even alluding to the risk of exposing the plaintiff to considerable damage in the present case. For these reasons, although with great reluctance, I must conscientiously dissent from the judgment to be pronounced quashing the capias in the present case.

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CASAULT, J.: Cette cause et seize autres des mêmes demandeurs contre divers autres défendeurs sont en révision d'un jugement de la Cour Supérieure à Québec, annulant (quashing) le bref de capias. Le 1er moyen invoqué par les défendeurs est que la déposition pour l'obtention du bref a été assermentée devant le député protonotaire et le bref signé par lui, tandis qu'aux termes de l'article 807 C. P., la déposition ne pouvait être assermentée que devant un juge ou commissaire, ou le protonotaire, et le bref doit être certifié par ce dernier. S. R. B. C., ch. 93, sec. 12, impose au protonotaire de la Cour Supérieure à Québec l'obligation de nommer un député. C. C., art. 17,n° 18, étend à son député les devoirs imposés et les pouvoirs conférés à un officier ou fonctionnaire public, et l'article 26 du C. P. applique à ce dernier Code toutes les dispositions de l'article 17 du C. C. L'autorité du député protonotaire de recevoir et d'assermenter la déposition et de certifier le bref, ne peut par conséquent être l'objet d'un doute. 2e. Le second moyen est que l'ordre du juge au bas de la déposition est insuffisant. Il n'ordonne point spécialement l'émanation du capias; il ne fait que fixer le montant du cautionnement au moyen duquel le défendeur pourra obtenir son élargissement. Par C. P. 801, lorsque la créance repose sur une demande de dommages-intérêts non liquidés, le capias ne peut émaner que sur l'ordre d'un juge après examen de la suffisance ou de l'insuffisance de la déposition sous serment, qui doit contenir certaines énonciations spéciales, et y est-il dit : "il est à la discrétion du juge d'accorder ou de refuser le capias et de fixer le montant du cautionnement au moyen duquel le défendeur pourra obtenir son élargissement." Le juge a, dans le cas présent, fixé le montant du cautionnement ; il a, par là même, exercé la discrétion que lui confère la loi, et permis l'émanation du capias. Car, sans le capias, le défendeur ne pouvait pas être arrêté et n'avait pas besoin de fournir caution pour obtenir son élargissement. 3e. Troisième moyen : Le capias a été exécuté le dimanche, sans déposition sous serment en établissant la nécessité, et l'ordre du juge n'est pas au dossier; on n'y trouve que le retour spécial du shérif énonçant que l'arrestation a été faite le dimanche sur l'ordre du juge mis au dos du mandat (warrant) resté entre les mains du geôlier. Le défendeur soutient que le juge n'a pas le pouvoir d'ordonner une arrestation sur capias le dimanche et il cite les art. 785, 786, C. P., pour montrer que le juge ne peut permettre l'arrestation sur contrainte par corps d'un défendeur le dimanche, que lorsqu'il est établi que le débiteur agit de manière à se soustraire à la contrainte ; le défendeur cite aussi Pothier, Proc. Civile, nos 259, 260. Ce moyen ne peut pas être invoqué dans les causes 487 Olsen défendeur, et 468 Foss défendeur, où l'arrestation a eu lieu le lundi. La contrainte par

corps est l'exécution d'un jugement, le capias ad respondendum, une assignation. C. P., 54, dit bien que l'assignation ne peut pas être donnée le dimanche, sans la permission expresse du juge; mais il ne dit rien de plus, et ne met pas à l'octroi de cette permission la condition mentionnée à l'art. 786 pour la contrainte. Cette condition se trouve néanmoins satisfaite dans le cas présent. Le juge ordonnait, le samedi, l'émanation d'un capias pour arrêter le défendeur que, dans la déposition pour capias, on jurait être immédiatement sur le point de laisser la Puissance avec l'intention de frauder les demandeurs. Cette déposition et le jour où on demandait l'ordre pour capias n'établissait-il pas la nécessité de l'arrestation le dimanche? Les demandeurs, pour en obtenir la permission devaient-ils invoquer d'autres circonstances? En pouvait-il invoquer de plus spéciales et de plus fortes? Cette permission doit être au dossier, le shérif devait la rapporter avec le bref et non la laisser au geôlier. Mais si le défendeur, qui avait obtenu que le shérif fit un rapport immédiat et anticipé du bref et des procédés sur icelui, n'était pas satisfait de l'existence de cet ordre, il devait, en se plaignant que le rapport était incomplet, en demander la production. Le tribunal l'eût ordonnée. 4e Quatrième moyen (plus bas). 5e. Cinquième moyen: La déposition requise n'a pas été faite par une personne ayant qualité. Le déposant, William Markland Molson, s'y intitule président du Moisic. Iron Co., et il n'est pas à ce titre une des personnes dont la loi requiert la déposition pour l'obtention du bref de capias.

C. P., 798, dit que ce bref est obtenu sur production de la déposition sous serment du demandeur, de son teneur de livre, de son commis, ou de son procureur légal. Il n'exige pas l'emploi rigoureux des termes dont il se sert pour qualifier les personnes dont la déposition est requise pour l'émanation du bref. Toute autre expression montrant que le déposant est, ou le demandeur, ou son teneur de livres, ou son commis, ou son procureur légal, suffit. Le demandeur, lorsque c'est lui qui dépose, n'est pas obligé de jurer qu'il est le demandeur: il lui suffit de dire que c'est à lui que la dette est due. Il en est de même du commis et du procureur légal. Dans la cause de la Banque de Montréal vs Coates, rapportée 2 R. de L., p. 328, (1)

loi. La été rév une diff et le p il, est l celui de tion. Le procuret Ils ne pe sont pas ration. mein brei contrats. par actio auxquels en quel faires de jet de la qui ait la présiden affaires? suffisamı le contra l'agent p Le défen dépositio celle en sition, el tient ries trat est exige l'és tant des mais ce 1 mettre c capias et tion succ liarités e ce rappoi posée des en juin 1 and Sand dette éta autre che personne en la son

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⁽¹⁾ Les mots demandeur, teneur de livres, commis ou procureur légal, mentionnés dans la section 4 du chap. 2 des Ordonnances du Gouverneur et du conseil législatif de 1785, 25 George III, comme indiquant les personnes qui peuvent donner la déposition sur laquelle un bref de capias ad respondencium peut émaner, ne sont pas des termes sacramentels, et un affidavit pour capias ad respondendum donné par le "caissier de la branche de la Banque de Montréal établie à Québec," est régulier, quoique le mot caissier ne soit pas mentionné dans la dite Ordonnance. (Coales & La Banque de Montréal, pour d'Appel, Québec, 30 juillet 1849, confirmant un jugement de la Cour du Banc du Roi, 19 octobre 1839; 2 R. de L., p. 328; 2 R. J. R. Q., p. 246.)

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nal, menur et du nnes qui ndencum ir capias inque de soit pas al, Cour du Banc la Cour a jugé que le caissier de la banque, en ne prenant que cette qualité, avait satisfait aux exigences de la loi. La sagesse de cette décision n'a jamais, que je sache, été révoquée en doute. Mais le défendeur prétend trouver une différence sous ce rapport entre le caissier d'une banque et le président d'une corporation privée. Le premier, ditil, est le procureur légal de la banque, le second n'est pas celui de la corporation. Je ne puis me rendre à cette distinction. Le praident et les directeurs d'une corporation sont ses procureurs légaux chargés de l'administration de ses affaires. Ils ne peuvent pas agir isolément et séparément, mais ils n'en sont pas moins les procureurs légaux, les agents de la corporation. C. C., 358, 359, 360. Les officiers choisis parmi les membres de la corporation la représentent dans tous les actes, contrats, ou poursuites. C. P. 61, fait le président de la société par actions un des procureurs ou représentants de la société auxquels doit être donnée l'assignation. Donnée à lui, n'importe en quel endroit, elle équivaut à celle donnée au bureau d'affaires de la société en parlant à un employé de tel bureau. L'objet de la loi est que la déposition soit donnée par une personne qui ait la connaissance des faits qu'elle jure. Qui plus que le président d'une corporation privée doit mieux connaître ses affaires? 6e. Sixième moyen: La cause de la dette n'est pas suffisamment énoncée dans la déposition. On eût dû y dire si le contrat qu'on y allègue était verbal ou écrit, et le nom de l'agent par l'entremise duquel la corporation avait contracté. Le défendeur paraît exiger plus de détails minutieux dans la déposition que dans la déclaration ou demande libellée, car celle en la présente cause n'est pas plus explicite que la déposition, elle est absolument dans les mêmes termes et ne contient rien de plus; néanmoins il ne l'a pas attaquée. Le contrat est réputé oral à moins d'allégation contraire. C. P., 801, exige l'énonciation dans la déposition de la nature et du montant des dommages réclamés et des faits qui y ont donné lieu, mais ce n'est que pour éclairer leligion du juge et lui permettre d'exercer sa discrétion en accordant ou refusant le capias et en fixant le montant du cautionnement. Une mention succincte et sommaire suffit sans entrer dans ces particuliarités et les détails. Or, voici ce que dit la déposition sous ce rapport: (reads from the affidavit). La Cour d'Appel, composée des juges DUVAL, AYLWIN, DRUMMOND et MONDELET, a, en juin 1865, dans la cause Gregory, appellant, et The Boston and Sandwich Glass Co., intimé, maintenu que la cause de la dette était suffisamment énoncée, quoiqu'il n'y fût pas dit autre chose, que le défendeur était vraiment, justement, et personnellement endetté envers la corporation, demanderesse, en la somme de \$2,500, étant le prix et valeur d'une grande

quantité de verre vendu par le déposant comme agent de la dite corporation au dit Gregory. 9 L. C. J., p. 134(1). 7e. Le septième moyen est que les raisons données dans la déposition sont insuffisantes pour faire croire au départ du défendeur. Voici cette partie de la déposition: "And this deponent further states that he has reason to believe and verily believes that the said Andreas Foss is about to leave immediately the Dominion of Canada with intent to defraud the said Moisic Iron Company, and that such departure will deprive the said Moisic Iron Company of its recourse against the said A. F., and for reasons of his said belief this deponent saith that the said A. F. joined with others at Moisic aforesaid in resisting the lawful commands of the Manager and Officers of the said Company, and with menaces demanded his discharge, and struck work, and afterwards left Moisic in a schooner with a great number of others, the said party so leaving declaring that they were going to join their friends in Chicago, in the United States; that the said A. F., by so leaving the service of the Company with the others as aforesaid to the number of fifty or thereabouts, has caused a stoppage of the works of the Company, and the said A. F. hath provided no means or given any security for repairing the great damages he has caused the said Company and hath no domicile or real or personal property within the Dominion, to the knowledge or belief of this deponent." Les raisons qui doivent être énoncées dans la déposition ne sont que celles nécessaires pour autoriser un homme raisonnable à croire véritablement que le défendeur est sur le point de quitter immédiatement la ci-devant Province du Canada avec intention de frauder son créancier. Or, quels sont les faits qu'affirme le déposant? Un Norvégien a laissé son pays pour venir, non pas résider permanemment au Canada, mais seulement pour y travailler un an; en vertu d'un contrat à cette fin il a reçu de fortes avances qu'il n'a pas remboursées; après avoir travaillé quelques jours à

Moisic, de trave une goé qu'ils a Unis. E cinquan biens da parer les Sur une allégation est dit q et qu'il est expo l'amende Cette po de Québ font croi la déclar lui. On number himself a qu'ils all ouvriers rendent e d'eux lu Pourra-ttous, et q nement n font un c ces circon créer, da intime qu avec inter jurer? O personnes causes où Mais, dans conviction les nomm puie la sie min et al., 12 R. J. R rait d'une qu'il donn même info R. Q., p. 1 R., p. 218; TON

⁽¹⁾ La vente faite à Montréal, à un acheteur y résidant, par l'agent d'un manufacturier de Boston, de marchandises qui, sur l'ordre de l'agent de Montréal, sont remises à Boston, à une compagnie de chemin de fer, pour être transportées à Montréal, aux frais et risques de l'acheteur, mais dont le connaissement du voiturier est au nom de l'agent à Montréal, à qui îl est transmis, pour qu'il fasse la livraison de ces effets à l'acheteur, est une vente faite à Montréal, et la créance pour le prix de vente, une créance créée dans la province du Canada, (art. 806 C. P. C. de 1867,) pour laquelle un bref de capias peut émaner. Le débiteur insolvable, qui laisse la province, emportant avec lui une somme d'argent (\$400), avec laquelle il achète une grocerie à New-York, et qui revient ensuite dans la province, peut être arrêté sur capias, en raison de son départ frauduleux avec le recel susdit; le retour n'ayant pas l'effet de couvrir sa fraude. (Gregory & The Boston and Sandwich Glass Company, C. B. R. en Appel, Montréal, 7 juin 1865, Duval, J. en C., Aylwin, J., Meredith, J., Drummond, J., Mondellet, J., 9 J., p. 134; 15 D. T. B. C., p. 475; 1 L. C. L. J., p., 37; 14 R. J. R. Q., p. 114.)

la dite ptième ont in-Voici iurther s that he Doic Iron e said 1 A. F., hat the sisting he said ge, and with a claring in the service nber of s of the r given caused erscr.al elief of es dans iser un endeur ot Proer. Or, rvégien mment n vertu

ent d'un agent de fer, pour dont le pui il est ne vente éée dans bref de aportant occrie à r capias, n'ayant ich Glass L. en C., 134; 15

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Moisic, en exécution de ce contrat, il a refusé d'obéir, a cessé de travailler, a abondonné les ouvrages, a laissé l'endroit dans une goélette avec plusieurs autres, et, en partant, ils ont dit qu'ils allaient joindre leurs amis à Chicago, dans les Etats-Unis. En laissant le service de la Compagnie, avec à peu près cinquante autres, il a arrêté les ouvrages, il n'a ni domicile ni biens dans la Puissance, et n'a pas pourvu au moyen de réparer les dommages considérables qu'il a causés à la Compagnie. Sur une motion pour mettre à néant le capias, la vérité des allégations de la déposition ne peut être mise en doute. Il y est dit que le défendeur a déserté le service de la Compagnie, et qu'il lui doit une forte somme d'argent, d'où il résulte qu'il est exposé, s'il reste dans la province, a l'emprisonnement et à l'amende, et à voir tout ce qu'il gagnera à l'avenir saisi-arrêté. Cette position qu'il s'est faite lui rend le séjour de la province de Québec presqu'impossible, et ajoute encore aux raisons qui font croire à son départ. D'après les termes de la déposition, la déclaration que l'on partait pour Chicago fait preuve contre lui. On y dit "that he left Moisic in a schooner with a great number of others, the said party so leaving (which means himself as one of the party as well as the others) declaring" qu'ils allaient joindre leurs amis à Chicago. Que plusieurs ouvriers se réunissent, qu'ils abandonnent leur ouvrage, se rendent ensemble chez celui qui les emploie, et que là l'un d'eux lui déclare qu'ils le laissent et s'en vont à Chicago. Pourra-t-on soutenir que cette déclaration n'est pas celle de tous, et qu'elle ne peut affecter que celui qui l'a faite? Certainement non. Or, les termes dont on se sert dans la déposition font un cas absolument identique. N'y a-t-il pas dans toutes ces circonstances, dans tous ces faits, tout ce qui est requis pour créer, dans l'esprit d'un homme raisonnable, la conviction intime que le défendeur allait immédiatement laisser le pays avec intention de frauder son créancier et pour autoriser à le jurer? On prétend que le déposant devait donner le nom des personnes qui lui ont fourni ses informations, et on cite des causes où l'arrestation a été mise au néant pour cette raison. Mais, dans ces causes, le déposant ne donnait pour motif de sa conviction que les rapports que lui avaient faits des tiers, sans les nommer, tandis que, dans le cas actuel, le déposant n'appuie la sienne que sur des faits dont il jure l'existence. Benjamin et al., vs. Wilson, 1 L. C. R., p. 351; 3 R. J. R. Q., p. 34, et 12 R. J. R. Q., p. 16; il a été jugé que lorsque le déposant jurait d'une déclaration faite à lui même, il n'était pas nécessaire qu'il donnât le nom d'autres personnes de qui il disait tenir la même information. Wilson vs Reid, 4 L. C. R., p. 157; 4 R. J. R. Q., p. 126, et 12 R. J. R. Q., p. 16; Berri vs Dixon, 4 L. C. R., p. 218; 4 R. J. R. Q., p. 166, et 12 R. J. R. Q., p. 16; Quinn TOME XXIII.

vs Atcheson, 4 L. C. R., p. 378; 4 R. J. R. Q., p. 203, et 12 R. J. R. Q., p. 17; Lefebvre vs Tulloch, 5 L. C. R., 42; 4 R. J. R. Q., p. 287, et 12 R. J. R. J. Q., p. 17; sont toutes des causes où le déposant jurait de l'existence des faits qui motivaient sa croyance, et où le tribunal n'a pas exigé plus. Il est bien vrai que dans le cas présent, le déposant ne dit pas spécialement que tout ce qu'il dit s'est passé en sa présence; mais en n'alléguant pas qu'il en a autrement obtenu la connaissance, il assume le connaître personnellement, et le tribunal ne peut pas présumer le contraire. 8e. Le huitième moyen est qu'il n'est pas allégué dans la déposition que le défendeur ait fait souffrir à la Compagnie défenderesse des dommages spéciaux, que le déposant y dit que ceux causés, sans en dire le montant, l'ont été par cinquante personnes, sans spécifier quelle part le défendeur doit en supporter, ni montrer qu'il soit responsable pour les autres. Mais le déposant dit que le défendeur a, sans causes raisonnables, sans excuses, et sans le consentement de la Compagnie, laissé son service, et lui a causé des dommages au montant de \$225. C'est bien là spécifier les dommages dont on le charge et que l'on réclame de lui. Dans les raisons spéciales qui font croire au déposant que le défendeur va laisser la Puissance, le déposant met celle que le défendeur a, en laissant avec cinquante autres, interrompu les ouvrages et causé de grands dommages à la Compagnie. Cette circonstance y est alléguée comme une des raisons qui rendent le départ du défendeur probable. Seule et ainsi énoncée, elle ne serait peut-être pas d'un grand prix; mais réunie aux autres, elle contribue à établir la probabilité du départ du défendeur. 9e. Le neuvième moyen est que la dette mentionnée dans la déposition y paraît avoir été créée hors de la cidevant province du Canada et pour laquelle, aux termes du C. P. 806, le bref de capias ne pouvait pas émaner. La déposition mentionne deux causes d'action, ou, si l'on veut, deux dettes distinctes, l'une au montant de \$26.70, pour avances faites au défendeur, en Norvège, pour lui permettre de payer son passage au Canada, l'autre, formant la balance de la réclamation, pour dommages causés à la Compagnie par l'abandon de son service, onze jours après y être entré, et l'inexécution du contrat par lequel le défendeur devait lui donner son travail pendant un an. L'obligation du défendeur, comme celle de la Compagnie, a été contractée en Norvège, mais elles devaient toutes deux être exécutées dans la province de Québec. C'est là que le défendeur devait travailler, et là que la Compagnie devait le payer. En promettant d'acquitter là son obligation, le défendeur se soumettait, pour son exécution, aux lois de cette Province; il stipulait que ces lois détermineraient ses droits et ceux de la Compagnie, à

laquelle proques dans la dette n créée p non seu puisse a à Monti rance, r et 20 R jamais r de vaiss des mai porter à livrait p les caus la dépos alléguées rembour le défend rendu, a lement r de travai à l'exécu la Compa outre des dommage c'est là q homme of ville por usine, po construir quillemen pour les s'obligear dette qu' service de qu'a caus mation, il somme a prêt, com son trava On n'y e boursable gages, elle quent à M et l'autre 2 R. J. . R. Q., s où le ent sa en vrai lement n'allénce, il eut pas est pas frir à la e dépoont été endeur our les causes de la ages au es dont ns spélaisser ir a, en ages et circonsndent le l elle ne autres, défentionnée e la cimes du er. La n veut, 0, pour rmettre balance nie par ntré, et vait lui endeur, orvège, la provailler, nettant it, pour que ces

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laquelle il s'obligeait, qu'elles règleraient leurs recours réciproques, dans le cas d'inexécution, et même, s'il se renduit dans la province, le mode d'exercer ce recours. Pour qu'une dette nit été contractée à l'étranger, et que la partie qui l'a créée puisse invoquer l'exception de l'Art. 806 C. P., il faut, non seulement qu'elle se soit obligée à l'étranger, mais qu'elle puisse acquitter là son obligation. On l'a formellement décidé à Montréal (Monk juge), dans la cause de Macdougall & Torrance, rapportée au 5 L. C. J., p. 148; 8 R. J. R. Q., p. 136, et 20 R. J. R. Q., p. 145; et je ne sache pas que l'on ait jamais révoqué en doute, dans ce district, que le capitaine de vaisseau qui, hors de la Province du Canada, recevait des marchandises à son bord, et s'obligeait de les transporter à Québec, pouvait y être arrêté par capias, s'il ne les livrait pas, ou s'il les livrait endommagées. Si on peut, dans les causes qui nous occupent, mettre en donte, parce que la déposition ne le dit pas expressément, que les avances alléguées avoir été faites en Norvège, au défendeur, étaient remboursables à Moisic, on ne peut certainement pas dire que le défendeur ne devait pas fournir là son travail. Il s'y est rendu, a commencé à travailler, y a, par là même, formellement ratifié le contrat; et ce n'est qu'après plusieurs jours de travail, après un commencement d'exécution, qu'il se refuse à l'exécuter en entier, qu'il abandonne les ouvrages et cause à la Compagnie, en les laissant, les dommages qu'elle réclame en outre des avances. On ne peut certainement pas dire que ces dominages soient une dette contractée à l'étranger parce que c'est là qu'il s'est engagé. Autrement, il faudrait dire qu'un homme qui, en France, s'engagerait à un habitant de cette ville pour venir y construire et y mettre en opération une usine, pourrait, après la construction des bâtisses, se refuser à construire et y mettre les machines, et s'en retourner tranquillement dans son pays sans qu'on put l'arrêter par capius pour les donnages causés par son refus. Le défendeur, en s'obligeant, à Christiana, a contracté là la dette de son travail. dette qu'il devait acquitter à Moisic; en désertant à Meisic le service de la Compagnie, il a contracté la dette des dommages qu'a causé sa désertion. Quant à cette partie de la réclamation, il ne peut pas, suivant moi, y avoir un doute. La somme avancée pour le passage du défendeur n'est pas un prêt, comme on l'a prétendu, mais un paiement anticipé pour son travail, une avance comme on l'appelle dans la déposition. On n'y dit pas spécialement, il est vrai, où elle était remboursable mais puisqu'elle était un paiement anticipé de ses gages, elle était remboursable, par son travail, et par conséquent à Moisic. Je ne vois pas de différence entre cette dette et l'autre quant au recours par cupius. Mais, en supposant

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qu'il y en ait, et qu'il ne pouvait pas émaner pour ces avances, le montant fixé par le juge pour le cautionnement que doit fournir le défendeur pour obtenir son élargissement, n'excédant pas les dommages, le capias ne devrait pas, pour cette raison, être annulé. Il y a eu des décisions en Angleterre maintenant qu'une déposition qui mentionnerait plusieurs dettes distinctes était insuffisante pour le tout, si elle l'était pour une partie; mais on a depuis abandonné cette opinion. Willmore, Wollaston & Hodges, Rep., p. 192, Jones vs Collins. Aujourd'hui, on y décide, et avec raison, que la déposition n'est insuffisante pour le tout que lorsqu'elle ne mentionne qu'une seule et même somme pour plusieurs dettes, dont quelques-unes sont alléguées d'une manière insuffisante. On a aussi décidé la même chose ici; voir Robertson's Digest, p. 59—Patterson et al., vs Bourn, King's Bench, Q. 1810(1). Les avocats du défendeur, tout en admettant cette distinction, dans un mémoire soumis depuis que la cause a été plaidée, soutiennent qu'on ne peut pas la faire dans cette province, d'abord, parce que le juge n'y peut pas, comme en Angleterre, réduire le montant du cautionnement requis, et ensuite, parce que les circonstances qui font croire au déposant que le défendeur veut frauder le demandeur, peuvent n'avoir trait qu'à la partie de la dette pour laquelle le capias ne peut pas émaner. La première de ces deux raisons, fût-elle vraie, ce que je ne puis pas admettre, n'aurait pas son application dans cette cause, où le montant du cautionnement n'égale pas celui des dommages réclamés en outre des avances, et par conséquent nous n'avons pas à réduire le cautionnement; et les énoncées de la déposition réfutent la seconde. Revenons au 4e moyen invoqué par le défendeur, et qui est que la déposition ne dit pas qu'il était sur le point de laisser la partie de la Puissance qui constituait ci-devant la Province du Canada. J'ai déjà dit que la loi n'exigeait pas l'emploi rigoureux des termes dont il se sert; et, depuis la Confédération, n'y avant plus de Province du Canada, cet emploi rigoureux serait impossible. Mais le déposant doit se servir d'expressions équivalentes et signifiant la même chose. Si la Puissance du Canada ne se composait que de ce qui formait ci-devant la Province du Canada, ou si la déposition indiquait qu'au moment où elle a été assermentée, le défendeur était dans les limites de cette ci-devant Province, ou même qu'il devait y être, je croirais qu'en disant qu'il allait laisser la Puissance, elle satisfaisait aux exigences de la loi; mais la déposition est assermentée le vingt-et-un à Québec; on y dit que le neuf, le

⁽¹⁾ Un affidavit pour capias peut être irrégulier pour partie, et être suffisant pour l'autre partie. (Patterson et al. vs Bourn C. B. R., Québec 1809, 2 R. J. R. Q., p. 297.)

défendeur laissait Moisic pour Chicago. Dans les onze jours

r pour ces tionnement rgissement, t pas, pour Angleterre t plusieurs i elle l'était tte opinion. s vs Collins. déposition mentionne dettes, dont isante. On a 's Digest, p. 1810 (1). Les distinction, été plaidée, te province, Angleterre, nsuite, parce osant que le n'avoir trait ne peut pas elle vraie, ce lication dans rale pas celui et par conment; et les Revenons au que la dépola partie de e du Canada. igoureux des n, n'y ayant x serait imessions équi-Puissance du ci-devant la iquait qu'au était dans les u'il devait y a Puissance, éposition est

qui se sont écoulés entre ces deux dates, il a bien pu laisser la province de Québec et aller au Nouveau-Brunswick, ou même dans la Puissance, partout ailleurs que dans les provinces d'Ontario et de Québec, qui formaient toutes deux, à la date de la mise en force du Code de Procédure, la Province du Canada. La destination de la goëlette sur laquelle le défendeur s'embarquait, n'est pas mentionnée, et rien n'indique qu'elle devait venir à Québec plutôt que aller à Shédiac ou à Pictou, d'où il n'était aussi près de Québec, et d'où il pouvait tout aussi bien rapidement se rendre à Chicago sans même passer par la province de Québec. Le Code permet l'émanation d'un capias contre une personne sur le point de laisser la Province du Canada; il ne l'autorise pas contre une personne en dehors de ces limites. Il est bien vrai que le défendeur a, deux jours après, (et tous les autres défendeurs, moins un le lendemain), été arrêté dans le district de Québec : mais sur motion pour annuler un capius, le droit ne doit s'occuper que de la déposition et de la suffisance de ses allégations, sans chercher dans les procédures qui l'ont suivi, le complément de ce qui y manque. Maintenir le capias et dire que la déposition est suffisante, serait, suivant moi, autoriser l'émanation d'un capias contre une personne résidant dans la province du Nouveau-Brun-wick, et qui serait sur le point de partir pour les Etats Unis. Le déposant qui aurait ainsi obtenu le capias, n'aurait plus, pour faire arrêter le défendeur, qu'à l'attirer sur les confins de la province de Québec. Je crois qu'il manque dans la déposition une allégation essentielle, et que, pour cette raison, le capias doit être mis à neant et le jugement confirmé. C'est aussi l'opinion du Juge-en-Chef qui a, sur cette question, des notes plus étendues, et je concours dans tout ce qu'elles énoncent.

MEREDITH, C. J.: "The affidavit alleges that the defendant is about to leave immediately 'the Dominion of Canada,' instead of alleging that the defendant was about to leave immediately that part of the Dominion of Canada heretofore known as the province of Canada. In the present case, owing to the province of Canada having as such ceased to exist, it was impossible for the person making the affidavit to use the words of the Code, and even if that had been possible, I would not hold it to be absolutely necessary; but where words are substituted for those to be found in a law, and more particularly in a case involving the liberty of the subject, I do hold it to be absolutely necessary that the words substituted be beyond doubt equivalent to those for which they are substituted. It is plain that, if at the time of the making of the affidavit, defendant, to the knowledge

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of deponent, had been in Nova Scotia, or in British Columbia. and about to go to the United States, he could have sworn as he did, 'that the defendant is immediately about to leave the Dominion of Canada,' and yet, it is equally plain that, in the case supposed the plaintiffs would not have had a right to sue out a writ of capias ad respondendum. If, in addition to the allegation 'that the defendant is immediately about to leave the Dominion of Canada,' it clearly appeared upon the face of the affidavit that at the time it was made the defendant was in the province of Quebec, I would deem that sufficient, because in that case the defendant could not leave the Dominion of Canada without leaving the late Province of Canada; and these allegations would justify the further statement 'that such departure will deprive the plaintiff of his recourse.' But it does not appear by the affidavit, that when it was made, the defendant was in the province of Quebec, or even in the late Province of Canada; on the contrary, the affidavit was made on the 21st June, and all we know from the affidavit about the defendant, in this respect. is that some time after the 9th of June, the defendant left Moisic in a schooner with a great number of others, the said party so leaving declaring that they were going to join their friends in Chicago, in the United States.' Indeed, if the allegation that a defendant is about to leave immediately 'the Dominion of Canada,' be declared to be good, I do not see how the allegation, 'the defendant is about to leave immediately the Continent of America, could be held to be The Dominion of Canada, it is true, includes the late Province of Canada; but so does the Continent of America. Either of the two allegations already mentioned would, in this respect, probably suffice if accompanied by the statement that, at the time of the making of the affidavit, the defendant was within the limits of the province of Quebec; but without that statement, it appears to me that the two allegations would be equally insufficient. It has been contended that if the defendant had not been in the province of Quebec, he could not have suffered from the issuing of the writ, but that contention admits of two answers: Firstly; We are not now called upon to decide whether the defendant was or was not exposed to be arrested under the writ—what we have to determine is simply whether under the affidavit in question the plaintiff was entitled to the writ sued out. The second answer that may be given to the contention now being considered, is that, if at the time of the making of the affidavit, the defendant had been in Manitoba and had immediately returned to this province, with the intention to remain, he would have been liable to be arrested under a writ, which in

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the case supposed certainly ought not to have issued. rule by which we ought to be guided in cases such as the present, was laid down by Lord Ellenborough, in the words: The strictness required in these affidavits, is not only to guard the defendants against perjury, but also against any misconception of the law by those who make the affidavit, and the learned Chief Justice added: 'The leaning of my mind is always to great strictness of construction where one party is to be deprived of his liberty by the act of another.' 11 East 315. This rule has been frequently acted upon by our Courts, but I can hardly say I deem its application necessary in the present instance; because it appears to me that, even according to the ordinary rules of construction, it is impossible to say that an affidavit that a defendant is about to leave 'the Dominion of Canada,' which would be true if the defendant were about to leave Nova Scotia, New Brunswick, Prince Edward Island, Manitoba or British Columbia, in order to go to the United States, is of itself equivalent to an affidavit that the defendant is about to leave the late Province of Canada, which would not be true if the defendant was about to leave any of the said five Provinces."

RAMSAY, J., dissentiens (In appeal): This case comes before us on a motion to quash a writ of capias ad respondendum. There are a variety of grounds alleged on which it is sought to have the capias set aside. On all of these save one I believe the Court is agreed, and that they are deemed to be insufficient, I shall therefore only allude to the one reason in which I, with my brother Monk, dissent from the majority of the Court. The ground to which I refer is the absence of any substantial allegation that the defendant was about to leave that part of the Dominion of Canada heretofore representing the Province of Canada. Before explaining my views on the merits of this question I must dispose of two preliminary objections raised by the Counsel for the appellant.

He says that this writ was issued on the authority of a judge, and that consequently we cannot go behind his order. It is said that he had a discretion to exercise, that he has exercised it, and that there is an end of the matter. I think this is a misapprehension which will be cleared away if we look at the history of the law. Originally, in cases of unliquidated damages, the plaintiff got his writ on affidavit exactly as in ordinary cases of debt. It was felt that this was a hardship, and that it put parties, whose affairs led them to leave the country, at the mercy of unscrupulous claimants, and the law was modified so as to render it necessary, before issuing the writ for a debt arising out of damages, then unliquidated to obtain the order of a judge. This was an

amendment of the law clearly in favor of the defendant: but if we were to hold that this order, obtained exparte, were to preclude a contradictory revision then we should be converting what was intended to be an advantage into a disadvantage. The discretion of the judge who gives the order is as to the expediency of allowing the writ to issue at all; it does not extend to absolving the plaintiff from making the necessary affidavit. The other preliminary question is that the motion does not sufficiently set forth the objection taken to the affidavit. I am of opinion that the grounds are sufficiently assigned 15thly and 17thly. The latter of these grounds distinctly says that the allegations required by law are not to be found in the affidavit. This covers very amply the defect insisted upon now. These preliminary questions being disposed of, it appears to me that the whole question is in a nutshell. If there is any principle consecrated by a constant and unvarying jurisprudence it is this, that the affidavit for a capias must be precise, and that everything required by the Statute must be formally alleged—i. e., sworn to—leaving nothing to be inferred. I remember that this was distinctly laid down in Nye vs Macalister nearly twenty years ago (1). I never heard of this doctrine being overruled, and I do not think even now the ruling will be called in question. Let us then look at the precise case. The Code requires that the plaintiff should allege that defendant "is about to leave immediately the Province of Canada." Of course these words cannot now be used, and consequently plaintiff was obliged to substitute other words of a similar meaning. The words he has chosen are that defendant "is about to leave immediately the Dominion of Canada." It will not be seriously contended that these words are equivalent. The former Province of Canada is not co-extensive with the Dominion of Canada; and it is a mere fallacy to say that the Dominion of Canada being greater includes the Province of Canada, as the greater includes the less. It is precisely because the Dominion includes the Province, and something more that it is a bad definition of the defendant's movements, which it was necessary to circumscribe. But the real test is this, the plaintiff might have sworn all he did, with truth and not be entitled to his writ. It is not, however, squarely maintained that this allegation

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⁽¹⁾ L'affidavit pour capias doit contenir tout ce qu'il est nécessaire d'alléguer pour le faire maintenir. Ainsi dans une poursuite accompagnée d'un capias basé sur une créance qu'un tiers avait contre le défendeur et qui a été transportée au demandeur, la signification au défendeur du transport fait au demandeur, doit être alléguée dans l'affidavit. (Nye vs Macalister, C. S., Montréal, février 1854, Day, J., Smith, J., et C. Mondellet, J., P. D. T. M., p. 27 et 2 R., J. R. Q., p. 347.)

of itself is enough, and stress is laid upon the fact that the defendant left the District of Saguenay on the 9th June, and that he or some one or more of his associates said they were going to Chicago in the United States. This it is said helps the allegation and narrows the Dominion of Canada to the size of the late Province of Canada. If this is not the pretention, then it must be said that it was unnecessary to mention the Dominion of Canada at all in the affidavit, and that it would have been sufficient for plaintiff to say that defendant left the District of Saguenay on the 9th June saying he was going to Chicago in the United States. But the answer to this sort of reasoning is that the conclusion arrived at by the Court is an inference from facts sworn to and not a fact absolutely sworn to. What plaintiff had to do was to swear his belief and not to swear to facts which might induce others to believe what he ought to have sworn to. I am therefore of opinion that the affidavit is insufficient, and that the judgment of the Court of Review should be contirmed. Monk, J., also dissentions, relied on the reasoning of his

brother Ramsay and the Chief Justice in the Court below.

TASCHEREAU, J.: The only question which should seriously engage our attention is this: Had the plaintiffs the right of issuing a capias against the defendants by virtue of the affidavit made by the President of the Company, in which affidavit the President has not sworn that the defendants were immediately about to leave that part of the Dominion of Canada heretofore known as the Province of Canada, but has contented himself with swearing that they were about to leave the Dominion of Canada? A number of objections have been taken against the affidavit, and to the Judge's order, but as all these objections appear to have been set aside by the honorable Judge of the Superior Court, who. in the Court of Review, pronounced the judgment from which the present appeal has been instituted, viz., the judgment quashing the writ of capias, and as I do not attach any importance to these first objections, I shall confine myself to the discussion of the single question to which I have adverted. The respondents say that the affidavit of the President of the Company is insufficient, and does not set forth sufficient facts to warrant the Company in issuing a capias; that there is nothing to shew that at the time when the affidavit was made the defendants were in the heretofore Province of Canada. I admit that, from the first moment that objection was submitted to us, I found no real weight in it. In fact, if that strictness be exacted an affidavit made by an inhabitant of the city of Quebec against one of his

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townsmen living in the same city, without saying that at the moment when the affidavit is made the latter is still in the Province of Canada, but is upon the point of leaving for Europe, or of leaving the Dominion of Canada, would be null, and the capias, even if executed at Quebec an instant after the making of the affidavit, would be well and duly set aside! I think that such a capias would be unassailable. But if one reads attentively the affidavits made in the present cases, it is seen that it is there positively sworn, on the 21st of June, that the defendants had left the service of the plaintiffs on the 9th of June, and had then embarked on board of a schooner at Moisic, where they then were, in order, with others, to proceed to Chicago, in the American Union; and, in fact, they arrive at Point Levi about the 21st and are arrested on the 22nd and 23rd of June. Doubtless the affidavit might have been more explicit, but it seems to me sufficient for all the requirements of law, and establishes a legal presumption of the presence of the defendants within the limits of the former Province of Canada, at the time when Mr. Molson made his affidavit. He swears that the defendants were, on the 9th of June, at the place called Moisic, that they embarked there, on or after the 9th June, with the intention of leaving the Dominion of Canada, and, in fact, without leaving the Province of Quebec, they proceeded from Moisic direct to Quebec, where they were arrested. I accede to the proposition of the respondents that the affidavit should show, upon its face, the right of capias, and if I cite the patent fact that these defendants have not for one instant left the Province of Canada, it is not to help the plaintiffs, but in order to show that if the President, in his affidavit, has given a narration of the facts to obtain a capias, not only he is not contradicted by the subsequent events, but he is entirely corroborated. His language is not the verbose language of an old Procureur du Chatelet, but that of a business man, who only says what is necessary and nothing more. He has complied with the requirements of Art. 20 of the Code of Procedure, which declares that:—"In any judicial proceeding it is sufficient that the facts and conclusions be distinctly and fairly stated, without any particular form being necessary." His affidavit is simply this:-These men whom I left at Moisic, about the 9th of June, embarked on a schooner for the purpose of going to Chicago, and on the 22nd of June, they are arrested on their way from Quebec to Chicago. Unless we return to those ancient formalities, which ridicule has driven out of the courts of justice, I do not see how. taking altogether all the circumstances of the case, we can

come to without s manner t the forme In fact, th are arrest time to g 22nd retu had emba: therefore, for the va be within the making suppose th for a moun and swear Canada. argument executed a would be below has absolute n whether t or out of affidavit, v of the pale of the pers case. I re reports of of all thes it will be on pain of the word quashed b significatio and yet we the sacramted, and wi statement of personal co and that, w It was not of ordinary as by the sacramente be so in f relation to at the still in ing for e null, t after duly ailable. in the sworn. service barked were, nerican he 21st ubtless seems w, and of the ince of fidavit. f June, e, on or ng the ng the rect to ne prol show, ent fact eft the but in s given e is not entirely nguage ss man, He has Code of ceeding tly and essary." left at chooner f June, Chicago. ridicule ee how.

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come to any other conclusion than to say that the affidavit, without stating it ipsissimis verbis, sets out in a sufficient manner the presence of the defendants within the limits of the former Province of Canada at the time of the affidavit. In fact, the affidavit is made on the 21st of June, and they are arrested on the 22nd, at Levis. Would they have had the time to go to the United States and between the 21st and 22nd return to Canada, in a sailing schooner, on which they had embarked? Evidently not, and on the 21st they were, therefore, in the former Province of Canada. I have reasoned, for the validity of the affidavit, that the defendants should be within the limits of the Province of Canada at the time of the making of the affidavit. I deny any such necessity. For, suppose the case of a plaintiff, ignorant of his debtor being for a moment beyond the frontier of the Province of Canada, and swearing that the latter was upon the point of leaving Canada. It would require, in my opinion, a large amount of argument to convince any one of the illegality of a capias executed after the return of the debtor to Canada. Now, that would be the consequence of the judgment which the Court below has rendered, and, in future, it would be a matter of absolute necessity to ascertain, before taking out a capias, whether the defendant is concealing himself in Canada, or out of the country. It seems to me that good faith in an affidavit, with a narrative not clothed in the verbose language of the palais, but giving a faithful exposition of the thought of the person who swears, is all that the law requires in such case. I remark that since the origination of our judicial reports of Canada, we have got rid, with great advantage, of all these technical objections. To cite but one example: it will be recollected that the Courts formerly exacted, on pain of nullity, that an affidavit to hold to bail should use the words "personally indebted," and many a capias has been quashed by reason of the omission of these words, the signification of which many persons did not understand, and yet we have come to the adoption of a form, from which the sacramentel word "personally" has been entirely omitted, and writs of capias have been maintained, provided the statement of the cause of debt disclosed the existence of a personal contract between the plaintiff and the defendant, and that, without using the word "personal" or "personally." It was not without an arduous struggle that this first victory of ordinary language, intelligible as well by the educated as by the ignorant, over the verbose and supposed sacramentel language of bygone years, was obtained. It will be so in future as to the objection of the respondent in relation to the necessity of the plaintiff's swearing to the

actual presence of the defendant in Canada, at the very moment of the making of the affidavit, provided that, according to the language employed and the circumstances attending the issue of the writ and its execution, as in the present case, the conclusion may be reasonably arrived at that the defendant is in a position to be arrested. I will eite the opinion of Lord Mansfield, in the cause of Bristow vs Wright, 2 Douglas Rep., p. 666, and that of Taylor (on Evid.) as to the choice to make between a rigid and restricted interpretation and the liberality with which Courts of Justice should interpret language, and he expresses himself by saying that Judges are beginning to discover that substantial justice is of much greater importance than technical precision. 1 Taylor, § 227: Lord Campbell's act has been in operation for too short a time to justify the expression of any confident opinion as to the amount of liberality with which its language will eventually be construed by the Courts. The narrow rules of interpretation which have been promulgated by one or two of the Judges with reference to the prior statute, 9 Geo. 4, c. 15, are calculated to excite a rational fear lest an equally strict construction should be applied to the amendment clauses of this act; but, on the other hand, it cannot be denied that the subject is now far better understood than it formerly was, and that even Judges are beginning to discover that substantial justice is of more real importance than mere technical precision. Wise men should ever bear in mind that the object of the acts which authorize amendments in criminal proceedings is to render punishment more certain by neutralizing the effect of trivial variances, which have constantly protected the wrong-doer. So long as the least rational doubt exists respecting the guilt of a prisoner, it is only fair that's the ample shield of justice should screen him from injury: that juries should weigh with jealousy the evidence against him, and the Judges should see most clearly that the act with which he is charged is an offence against the law. But when courts of justice go further than this, and permit the law to be defeated by technical errors, which cannot by any possibility mislead a defendant, and which have nothing to do with the substantial merits of the case, they take the most effectual means of rendering the administration of the criminal law a fitting subject for contempt and ridicule. The language of Lord Mansfield, in Bristow vs Wright, 2 Doug. 666. should never be forgotten: "I am very free to own," said his Lordship, "that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being. defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because it is

extremely expense, f ploys. 1 find that rent write norable . ordered th he did. Superior (sented, w of the Su tant enou; exception as it has t which imp special ma tion is um grounds ir Now, the plaintiffs I the hereto tely upon Canada; o grounds, i capias, one are many L nullities, b they have adverted to restrict the object is no kyrielle of character, a tion to gro producing 15 establisl as they, the to be under the affidavi signifying Canada, an plaintiffs de in the imme vince.-- No been presen to the concl davit suffici ie very d that. istances s in the rived at will cite istore vs n Evid.) estricted Justice v saying d justice recision. peration confident hich its irts. The nulgated he prior mal fear d to the it cannot d than it discover mn mere nind that eriminal neutralonsigntly ral doubt fair that n injury: e against the act law. But ermit the ot by any othing to the most he crimi-The lanloug. 666. " said his ns always rom being from the eause it is

extremely hard on the party to be turned round, and put to expense, from such mistakes of the counsel or attorney he employs. It is hard also on the profession." In conclusion, I find that the plaintiffs have produced, to obtain their different writs of capias, sufficient affidavits, justifying the Honorable Judge before whom they were presented, and who ordered the issuing of the writ of capius in question, to act as he did. I am for reversing the judgments pronounced in the Superior Court and in Review. But another question is presented, which seems to have had no weight with the Judges of the Superior Court, but which appears to me to be important enough. Although at first sight, it may be regarded as an exception to the form, it is not the less substantial, inasmuch as it has the express sanction of the Rule of Practice, no 57, which imperatively requires that "every motion founded on special matters shall contain the grounds on which such motion is made, and no party shall be permitted to urge any grounds in support of a motion not set forth in such motion." Now, the defendants complained at the argument that the plaintiffs have not shewn by their affidavit that they were in the heretofore Province of Canada or that they were immediately upon the point of leaving the heretofore Province of Canada; and on reading their twenty-one objections, or grounds, invoked in support of their motion to quash the capius, one looks in vain for any such special ground. There are many generalities, banales expressions of irregularities and nullities, but nothing special in relation to the ground which they have invoked in their oral pleading. The object of the rule adverted to is to particularize the ground of objection, and to restrict the discussion to such ground or grounds; and this object is not attained in losing one's self in an interminable kyrielle of objections (to the number of twenty-one) of a general character, and not special. The defendants have drawn attention to ground no 15, as coming to their rescue; but far from producing the effect which they desire, this very ground no 15 establishes the position taken by the phintiffs, inasmuch as they, the defendants, by this ground of objection, cause it to be understood that they have interpreted the allegation in the affidavit, "Dominion of Canada," as a substitute for, and signifying for all legal purposes, the heretofore Province of Canada, and that their only objection on this score is that the plaintiffs do not give sufficient reasons to justify their belief in the immediate departure of the defendants from this province.—Now, all the julges before whom this objection has been presented, have come, or at least appear to have come. to the conclusion that the plaintiffs have stated in their affidavit sufficient reasons to justify their belief in the immediate departure of the defendants. In a case of capias, where the liberty of the subject is at stake, a doubt should be interpreted in favor of the prisoner, but when the prisoner, with a knowledge of what he has wished to do, and actually does, will not, within the time specified by the Rules of Procedure take advantage of a pretended irregularity, and more, seems to waive or renounce it, he should not be permitted to complain, at the last moment, of an omission which, at the outset, he did not deem worthy of notice. If, in reality, the defendants were not about to leave the former Province of Canada, they had, under Art. 819 of the Code of Procedure, the right to be discharged from custody, and that without delay, long before they could make their motion before the Superior Court. They did not consider it their interest to do so, and if they have in consequence suffered a long imprisonment, they have them elves to blame for it. This last observation is not made to justify my judgment on the merits of the motion of the defendants to set aside the capias, but merely to show that defendants have only themselves to blame if they have suffered a long incarceration.

The following was the judgment in appeal: "The Court, considering that there is error in the judgments appealed from, and that the motion made by the defendant in the Court below, on the thirtieth day of June last, to quash the writ of capias ad respondendum issued, should have been rejected with costs; the affidavit upon which the said writ issued and the proceedings thereupon had been in all things regular and sufficient: This Court, proceeding to render the judgment which the said Superior Court should have pronounced upon the said motion, annuls and makes void the said two judgments of the second day of July and of the nineteenth day of September, one thousand eight hundred and seventy-three, and rejects and overrules the said motion to quash, with costs against the said respondent in favor of the said appellant as well in this Court as in the Court below; and it is further ordered that the record be remitted to the said Superior Court at Quebec. (18 J., p. 29.)

HOLT, IRVINE & PAMBERTON, for appellant.

WM. COOK, for respondent.

COURT OF

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Held:—A taxed at the paid a less s

In this of bill, allowing factum, ap \$92.00, allowing an affidav (17 J., p. 2 George

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EUTROPE (

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COSTS IN APPEAL.

COURT OF QUEEN'S BENCH, APPEAL SIDE, IN CHAMBERS,
Montreal, September, 1872.

Coram Monk, J.

O'GILVIE et al., appellants, and JONES, respondent.

Held:—A party is entitled to have his costs for printing in appeal taxed at the rate of two dollars per page, even although he may have paid a less sum per page to his printer.

In this case, the clerk of appeals having taxed respondent's bill, allowing him at the rate of two dollars per page, for his factum, appellants petitioned to revise, asking that the sum of \$92.00, allowed for "printer's bill," be reduced to \$69.00, being the amount paid by respondent to his printer, as proved by an affidavit produced with the petition. Petition rejected. (17 J., p. 25.)

GEORGE MACRAE, for appellants and petitioners. L. N. BENJAMIN, for respondent.

VOITURIERS .-- RESPONSABILITE.

Cour Supérieure, Montréal, 19 avril 1872.

Coram MAKAY, J.

EUTROPE CHARTIER et al. vs la compagnie du Grand-Tronc De chemin de fer du Canada.

2° Qu'une lettre de voiture, sur le dos de laquelle se trouve une clause conditionnelle limitant de cette manière la responsabilité d'une Compagnie de chemin de fer a pour effet de lier l'expéditeur si ce dernier a

signé sans réserve la lettre de voiture.

Dans le courant de janvier (1871), les demandeurs vendent à Patrick Corrigan, curé de Jersey-City, dans l'Etat de New Jersey, E. U., deux statues en plâtre, de la valeur de \$45.00. Dans le courant de février (1871), ces deux statues sont déposées à la station de la défenderesse, à Montréal, pour être, par cette dernière, expédiées au lieu de leur destination. Le reçu constatant le départ des deux statues, porte, par inad-

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vertance de la part des employés des demandeurs, la signature de "J. Nardini." Mais il est spécialement allégué que les demandeurs en sont les seuls et véritables propriétaires. Après les délais convenables, il est constaté que les deux statues déposées au dépôt de la défenderesse ne sont pas parvenues à leur destination; et les demandeurs par leur action, réclament de la défenderesse: 1° le prix de deux statues, soit: \$45: 2° la somme de \$55.00 comme compensation des dommages résultant de l'imprévoyance et de la négligence des employés de la défenderesse. La défenderesse a répondu par une exception et défense, alléguant " que les deux boîtes (two boxes pluster statues) ont été transportées régulièrement et avec diligence. dans les délais convenables, à la ville de St-Jean, dernière station de la défenderesse, sur son chemin de fer, via St. Albans, et que, là, elles furent remises, en bon ordre et condition, et en temps convenible, à la Compagnie de chemin de fer connue comme: " The Vern ont Central Railway Company," laquelle les a, de suite, et en temps convenable, transportées, en bon ordre et condition, jusqu'à New-York, le point le plus rapproché de Jersey-City. Les demandeurs prouvèrent, par la production de la lettre de voiture, et par l'audition de plusieurs témoins, la réception des statues, et l'engagement pris par la défenderesse de transporter, ou faire transporter, les dites statues jusqu'à Jersey-City. Mais sur le dos de ce bill of lading, se trouvent plusieurs clauses spéciales limitant la responsabilité de la Compagnie, celle-ci entre autres: "The Company will not be responsible for any goods mis-sent, unless they are consigned to a station on their Railway." La plupart de ces notices spéciales sont exorbitantes du droit commun, avant pour effet de limiter ou restreindre la responsabilité et les obligations imposées par la loi aux voituriers, tant par eau que par terre. Ajoutons qu'elles sont imprimées en très petit caractère, et qu'elles remplissent un large espace, ce qui rend assez difficile la tâche prudente incombant à l'expéditeur, souvent illettré, ou souvent trop pressé pour lire ces commentaires spéciaux, au bas desquels il met sa signature, sans connaître toute la portée de l'engagement auquel il s'astreint. Les principaux points de droit soulevés lors de l'audition de cette cause sont les suivants: 1° Le voiturier peut-il, par des conventions particulières, limiter sa responsabilité pour le transport des effets qui lui sont confiés? Autorités citées par la défenderesse : Code Civil du B. C., art. 1676 ; Rebel, Lég. des chemins de fer, p. 282, nº 506; Troplong, III, nºs 926, 942; Duvergier, II, Louage, nos 324, 325; Persil & Croissant, Commissionnaires, pp. 185, 186; Pardessus, Droit Com., II, nº 538. 2° Les parties sont-elles libres de régler les conditions railway line auxquelles doit être effectué le transport dont l'une se charge nont Centi

Traité, C v° Comm sec. 247, \$\$ 541, 5 Ed. 1864 1869, II, C. Jurist. Gelinas v man vs le 452; 1 R. bilité du le fardea tombe-t-il plong, Lo France, I Lég. chem sec. 247, 2 dence, II, fer sont-e pour être surtout s'i On Railwa Book 3, ch Co., rappo Carr vs Lo les demand Cie du G. J. R. Q., pp 8 R.J.R.Q., 173 , 8 R. J 89; 5 R. J. § 155, Ed. Com., II, 40 et suiv. Le Companies to be carrie and even be or injury to pened on th Le jugem tiffs have tl thing to wa

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envers l'autre? Pardessus, Droit Com., nºs 539, 576; Vaphufel. Traité, Contrat, Louage, pp. 66, 72, 73; Dalloz, Dicti. Juris., v° Commissionnaires, n° 178, p. 429; Angell, Law of Carriers, sec. 247, 248, 249, 251, 330; Story, On Bailments, Ed. 1863, §§ 541, 549, 556, 557, 558 et suiv.; Parsons, On Contracts. Ed. 1864, II, sec. 15, p. 223; Redfield, Law of Railways, Ed. 1869, II, 88, sec. 177 et suiv.; Torrance et al. vs Allan, 6 L. C. Jurist., p. 170; 10 R. J. R. Q., p. 260, et 22 R. J. R. Q., p. 480. Gelinas vs le Grand-Tronc, jugé en Appel, 9 sept. 1869; Gutman vs le Grand-Tronc, jugé en Appel, 8 sept. 1871. 3 R. L., p. 452; 1 R. C., p. 477, et 22 R. J. R. Q., p. 480. 3° La responsabilité du voiturier étant limitée par convention particulière, le fardeau de la preuve de négligence contre le voiturier. tombe-t-il sur l'expéditeur ou consignataire des effets? Troplong, Louage, III, nº 942; Bourjon, Droit. Com. de la France, II, 494; Vanhufel, Contrat de Louage, p. 91; Rebel, Lég. chemins de fer, p. 299, n° 530; Angell, Law of Carriers, sec. 247, 276; Story on Bailments, § 573, Greenleaf, On evidence, II, p. 211, § 215. 4º Les Compagnies de chemins de fer sont-elles responsables des effets qui leur sont confiés pour être transportés au delà des limites de leur chemin. surtout s'il existe une convention spéciale à cet effet ? Redfield. On Railways, II, 112, § 180; Parsons, On contracts, II, 212, Book 3, ch. II; 7 Exchequer, Fowles vs Great Western R. R. Co., rapporté aussi dans 16 English L. & E. Naph. p. 340; Carr vs Lancashire & Yorkshire R. R. Autorités citées par les demandeurs: Code Civil B. C. art. 1676; Huston vs La Cie du Grand-Tronc. 3 L. C. Jurist, 269; 6 J., p. 173; 8 R. J. R. Q., pp. 1, 10; Harris vs Edmontone, 4 L. C. Jurist, 40; 8 R.J.R.Q., p. 85; Le Grand-Tronc vs Mountain, 6 L. C. Jurist, 173, 8 R. J. R. Q., p. 10; Samuel vs Edmonstone, 1 L. C. Jurist, 89; 5 R. J. R. Q., p. 449; Troplong, Echange et Louage, III, § 155, Ed. franc.; Le même, p. 155, § 121; Pardessus, Droit Com., II, 461; Chitty, On Carriers, pp. 124, 130, 137, 144, 148 et suiv. Le même, p. 150, s'exprime ainsi : " Where Railway Companies hold themselves out as carriers, and receive goods to be carried to places beyond the limits of their own line, and even beyond the realm, they are responsible for a loss of for injury to the goods, although the same may not have happened on their own line of railway." Le jugement est en ces termes: "Considering that, if plain-

Le jugement est en ces termes: "Considering that, if plain-6; Rebel, Liffs have the right of Nardini, these do not amount to any thing to warrant a condemnation of defendants, who are proved to have done all they promised towards Nardini; that the statues referred to were, by defendants, at the end of their railway line, delivered duly, for further carriage to the Vermont Central Railway Company, for whose misdoings or wrongs, defendants cannot be held responsible; in the delivering of said statues to the Vermont Central Railway Company, defendants having acted merely as mandataires of Nardini, under their contract with him and the condition, particular of it, in this respect; Considering that defendants have proved their first plea, or exception, to extent sufficient to destroy plaintiffs' action, doth dismiss said action, &c. (17 J., p. 26.)

E. Lareau, avocat des demandeurs. Cartier & Pominville, avocats de la défenderesse.

INSCRIPTION. - PROCEDURE.

SUPERIOR COURT, Montreal, 31th October, 1872.

Coram TORRANCE, J.

S et al. vs Bowie et al.

Herd:—That the option of a party that the case shall be inscribed at the same time for proof and for final hearing on the merits, immediately after proof, in the terms of C. C. P. 243, is sufficiently made by service on the apposite party of an inscription of the cause upon the role de droit for Enquâte and hearing on the merits at the same time (17 J., p. 28.) (1)

F. J. Keller, for plaintiffs. Kelly & Dorion, for defendants.

RESPONSIBILITY OF POSTMASTER.

SUPERIOR COURT, Beauharnois, 18th March, 1872.

Coram DUNKIN, J.

A. V. DELAPORTE et al., vs John Madden.

Held:—That a postmaster is responsible for a registered letter lost through his neglect or that of his minor son, employed by him as his assistant, in leaving it in an exposed place in his office, contrary to the regulations of the Post Office Department.

This suit was issued, after notice of a month, to defendant, as a public officer, to recover \$575, the amount said to have been

(1) A similar decision was given, at the same time, in no 1829. The Trust and Loan Co. vs Drummond, & Drummond, oppt: It was intimated, at the time, that Mackay and Beaudry, JJ., concurred.

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enclosed in a letter mailed and registered in the Valleyfield Post Office, of which defendant was posmaster, on the 30th of September, 1870, by the firm of J. & A. Anderson, of Vallevifield, and addressed to A. V. Delaporte & Co., of Toronto. The declaration sets out these facts, and alleges that the letter was regularly mailed, 18 cents paid for postage, and 2 cents for registration, and a receipt duly given, but that defendant neglected to forward it by the mail, as he was bound to do, and was guilty of such carelessness and negligence that the letter, with its contents, was wholly lost. A second count follows, in which the same facts are stated, but formal mention is made of William Madden, defendant's minor son, and his assistant in the post office, as acting for him in this matter, and charging the carelessness and negligence on both of them. A third count charges him with receiving the letter, and the 20 cents for taking care of it, and mailing it, without saying anything about his being posmaster. The defendant, by his pleas, besides a general denial, specially denied that the letter contained money, or was so represented to him, and maintained that he had given to the letter all necessary care and that, as postmaster, he was answerable only to Her Majesty. and not to plaintiffs. The plaintiffs examined defendant, his minor son, King the post office inspector, and the two Ander-The defendant examined no witnesses. The case is fully set out in the judgment rendered by Mr Justice Dunkin. The following are the authorities cited by plaintiffs' counsel; Civil Code, Arts. 1053 and 1054; Statutes of Canada, 31 Vict. cap. 10, sec. 39; Campbell vs McPherson, 6 Upper Canada Reports (O. S.) 34.; Lane vs Cotton et al., 1 Lord Raymond, 646, and 1 Salkeld, 17; Whitefield vs Lord LeDespencer et al., Cowper, 765; Carey vs Lawless, 13 Upper Canada, B. R., 285; Addison, on Torts (3rd Edition) 1870, 15 and 16; Shearman & Redfield, on negligence (1869), sec. 180, pp. 211 and 212; Ford vs Parker, 4 Ohio State, 576; Angell, on Carriers, (4th Ed.) sec. 119; Dunlop vs Munro, 7 Cranch, 242; Bolan vs Williamson, 3 Bay, 551; Schroyer vs Lynch, 8 Watts, 453; Smith, on Law of reparations (1864), chap. 7, pp. 175 and 179. DUNKIN, J.:—It is in evidence that, by the rules of the

Post Office Department, known to defendant, postmasters were bound, whenever not required to have their office in a separate room, to keep mailed letters in a safe place, and under key; and, further, whenever an office might be kept in a store, or other place accessible to the public, to suffer no courier or unauthorized person to come near enough to the mails to be able to handle or examine their contents in any way; in a word, to allow no one whatever, under any circumstances, except himself or his sworn assistant, to have

access to letters or journals in the office, or the key of the mail bag; that defendant, solely on his own responsibility. had, for some time, employed his son, then in his 19th year, as his assistant, leaving to him nearly all the work of the office; that the case of pigeon holes for letters, &c., had been moved, again on his own sole responsibility, from the least exposed corner of his store to a place more convenient to himself and his son, but most exposed to access of all parties frequenting the store; that close to this case, and belonging to it, there was a shallow, open box, in which registered letters were kept until they were mailed; that, about noon on the day alleged, Arthur Anderson delivered the letter in question, containing \$575 in notes addressed to plaintiffs, to William Madden, desiring him to weigh and register it; that it was found to weigh between 21 and 3 onces, and, accordingly, six rates of postage, being 18 cents, together with the registration fee of 2 cents more (one third of such 20 cents forming the defendant's allowance, as postmaster, thereon), were paid on it, and it was duly registered, stamped and entered in the Registered Letter Book, and a certificate of registry in the usual form was given; that William Madden put it into the exposed box, and, soon after, by defendant's direction, went away for dinner, leaving two persons in the store, and his father either in the store or about the doorway; that defendant did not stay in the store until his son's return: that there was nothing to hinder any one coming in, from seeing and taking the letter; that the son, on his return, soon after set himself to make up the mail, and, at once, missed the letter; that it was earnestly searched for, but not found: that defendant instantly telegraphed for the post office inspector, who went up immediately, and made all further inquiries in his power; that, directly after the telegram was sent, it being then about two in the afternoon, Wm. Madden went to the Andersons to tell them; inquired how much was in the letter, and was told by them the amount as now sued on, and that the letter was never found, nor the party abstracting it detected. At the argument no case was cited as having ever come before a Court of Law, in this Province, involving the question of a postmaster's liability for a lost letter, nor is the Court aware that any ever has been. In the first English case bearing on the subject, that of Lane vs Cotton et al. (1 Raymond, 64), action was brought against the postmaster general, whose office was then (A.D. 1699) of recent creation, to recover the value of eight exchequer bills enclosed in a mailed letter; no mention to the party who personally took the letter at the post office, of its containing money value being alleged. No objection seems

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to have been raised on this account. Chief Justice Holt was for giving judgment against defendants. But the other three judges decided the case otherwise, holding them in fact, as high public functionaries, not liable for a failure which was not traced personally to themselves. In the next and ruling case on the subject, that of Whitefield vs Le Despencer et al. (Cowper 754), A. D., 1778, suit was brought to recover again from the postmaster general £100, the amount of a note enclosed in a letter that had been stolen by a letter sorter who had been hanged for the felony. The Court unanimously adhered to the precedent of the former case. In delivering judgment, Lord Mansfield used these remarkable words p. 765: "As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If a man who receives a penny to carry the letters to the post office, loses any of them, he is answerable: so is the sorter in his department, and so is the postmaster for any fault of his own." Upon the strength of these two cases, it has ever since been admitted, in England, that the postmaster general is not liable for loss of a letter, unless, indeed, it were (as it is hard to imagine it could be) from fault of his own; and, on the other hand, that every post office employé is answerable for whatever may result from his own fault, though for nothing more. The same doctrine has been emphatically held by the Courts of that part of the late Province of Canada, formerly Upper Canada, and now Ontario. In Campbell vs McPherson (6 U. C. Q. B. O. S., p. 34), the sender of a lost letter containing £12 10s. and marked "money," sued the receiving postmaster, as guilty of personal laches, and was met by a demurrer, on the sole ground of want of averment, or presumption that the letter was plaintiff's property, all parties admitting the liability otherwise. In Carey vs Lawless (13 U. C. Q. B., p. 285), the party to whom the lost letter was addressed. the same containing £17 18 1½, and no averment being made of its having been marked "money," or the fact of its containing money, the action was again based on alleged laches of defendant, and, upon demurrer, the Court held the suit well brought. In rendering this judgment, Judge (since C. J.) Draper, after citing Lord Mansfield's expression above quoted said: "If this be law, and I never heard it questioned, it seems difficult to sustain the causes of demurrer. If a letter being sent to the post office can be lost or destroyed by the negligence of the postmaster, under circumstances not amounting to felony, I do not understand

why the postmaster is not to answer for it in damages to the party injured." It was contended at the argument, that a postmaster being the mandatory of the Government, which is not and cannot be held liable for lost letters, must share its privilege in this respect. To this the sufficient answer is that, acting within the bounds of his mandate (C. C., 1715, 1727 cited), he does so. Government, on obvious grounds of public policy, assumes no liability as insuring letters, and cannot. in any case, be liable as for laches, by reason of the presumption juris et de jure that the Crown can do no wrong. Post office employés are no more liable as insuring letters than the Government is; and, unless for personal laches, cannot be made liable. But they one and all may fail of duty; and, whenever they do so fail, they are beyond the bounds of their mandate, and so become liable. Even the precautionary enactment of the Post Office Act (3 Vic. c. 10, sec. 39) that the "postmaster general shall not be liable to any party for the loss of any letter, packet or other thing sent by post," cannot any more than the old ruling of the English Courts, which it merely reproduces, be regarded as meant to cover the all but impossible case of such loss having occurred from personal fault on his own part. Attempt was made to show that the plaintiffs are not in this case the parties having interest. But, by sec. 39 of the Post Office Act, it is expressly enacted, as indeed was the legal presumption before, that, from the time any letter or thing is mailed, it is the property of the party to whom it is addressed. The parties mailing this letter have been examined in this case, and nothing they say at all shakes the presumption of property thus established by statute (as well for this purpose as for others) in behalf of the plaintiffs. It was also urged that, upon the principle laid down by Article 1677 of the Civil Code, in favor of carriers, a postman ought not to be held liable for the contents of a lost letter, under whatever circumstances, unless he has been distinctly informed beforehand of their amount, and that, in this instance, the defendant was not so informed. But the cases are not parallel. The carrier is to become liable as an insurer, and must establish the fortuitous event or irresistible force, in order to clear himself of that liability. The postmaster is not liable as an insurer, and can only be called to account on proof made against him of personal fault. No matter what the value of any letter is. if only he keeps clear of proven negligence and failure of duty, he is clear of liability. In the cases above cited. accordingly, notice to the postmaster of the contents of the letter has been regarded as immaterial. Not to say that,

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in this case, the proof made as to the weight of the letter, its registration, the knowledge of the postmaster and his son of the parties sending and addressed, and in respect of former letters of the same sort, and the attendant circumstances generally, shew that the post master (through his minor son, for whom he is responsible) was very sufficiently advertised of the care he ought to have taken of this letter, and, unfortunately for himself, failed to take. The defendant's honesty is not impeached, but the loss of this letter containing the amount demanded by this action, and the plaintiff's property is clearly traced back to negligence and default of duty, for which defendant is in law liable, in great part, by reason of his own acts and omissions, and, for the remainder, as liable for his mixor son acting under his orders.

The judgment is as follows: "Considering that it is established, in evidence, that the letter in the plaintiff's declaration mentioned, containing a value of \$575 in notes. was duly mailed to the address of plaintiffs on the 20th day of September, 1870, at the Post Office, at Valleyfield, defendant then and there being the postmaster thereof; that the said letter, then and there, being with such contents thereof, the property of plaintiffs, was, with such contents, on the 30th day of September, 1870, wholly lost, through gross neglect, carelessness, and violation of the known orders of the Post Office Department, on the part of defendant, and for which he was and is by law answerable in damages towards plaintiffs; and that, neither the said letter nor such money contents thereof have since been found; and, considering that plaintiffs have suffered by such wrong doing and default for which defendant is so answerable to them in damage to the said amount of \$575, doth condemn, etc." Judgment for plaintiff. (17 J., p. 29)

JOHN J. MACLAREN, for plaintiffs.
BRANCHAUD & CAYLEY, for defendant.

REVENDICATION .- OPPOSITION AFIN DE DISTRAIRE.

COURT OF REVIEW, Montreal, 28th June, 1872.

Coram Berthelot, J., Mackay, J., Beaudry, J.

BETHUNE vs CHAPLEAU et al., and Fraser, Oppt., and THOMAS, Int. party.

Held:-1º That a party claiming lands under seizure cannot do means of an Intervention, during the dependency of proceedings of opposition afin de distraire fyled by another party.

2º That an Intervention fyled under such circumstances, on a provisional order of a judge, will be rejected on a motion made to that effect.

This was a hearing in Review of a judgment of the Superior Court, at Montreal, rendered on the 30th of March.

1872, by Torrance, J.

LAFLAMME, Q. C., for intervening party: Le 15 février 1870, le demandeur fit émaner un bref de fieri facias de terris, contre le défendeur, en satisfaction d'un jugement qu'il avait obtenu contre lui, conjointement avec J. A. Chapleau, le 19 juin 1869; certains immeubles furent saisis, et la vente en fut fixée et annoncée pour le 28 juin 1869. Cette vente fut arrêtée par une opposition afin d'annuler, produite par Alexandre Fraser, le 4 juin 1869. L'opposant alléguait acte de vente de John Fraser à lui, en date du 15 septe 1863, de certains immeubles dans lesquels se trouvent prises les rentes constituées dont l'opposant réclamait la propriété, demandant à en être déclaré propriétaire. L'opposition fut contestée par le demandeur, et elle était encore pendante quand John Fraser intenta devant cette Cour, sous le n° 920 des dossiers de cette Cour, une action pour résilier l'acte de vente du 15 septembre 1863, par lui consenti à l'opposant. Henry Thomas intervint dans la cause nº 920, demandant la résiliation dudit acte du 15 septembre 1863, en sa faveur. et à ce qu'il fut déclaré propriétaire des immeubles mentionnés audit acte du 15 septembre 1863, alléguant un acte de transport de John Fraser à lui, dit intervenant, en date du 21 juin 1865. Le 29 décembre 1871, jugement intervint dans la cause n° 920, résiliant l'acte du 15 septembre 1863, et faisant droit sur l'intervention produite dans ladite cause, la maintint, et déclara propriétaire des immeubles y désignés, Henry Thomas, l'intervenant. Le 5 février 1872, Thomas intervint dans la présente cause, pour s'opposer à la vente des rentes constituées saisies par le bref de fieri facias de terris, du 15 février 1870, et allégua, à l'appui de son intervention, l'acte de transport à lui consenti par John

Thomas, cause no demander vention d ladite int et à la v vendus le moins qui rendu sur de ce jug mandeur relativeme avait été nullité de priétaire, prétendait appartena tervenant. d'interven contestation priété, et, sant et du MACKAY. être rejete L'interven fut pas r défendeur Cette inte contestation

BÉTOUR Le demi vertu duc rentes et Marc, de C Fraser, un bles, et, po faut suivre biens imm elle ne put faite et pr de cette op inscrite por février der le lendema prise en demandeur introduite Thomas, le 21 juin 1865, ainsi que le jugement rendu dans la cause nº 920, sur son intervention. Le 18 mars 1872, le demandeur dans la présente cause fit motion que l'intervention de Henry Thomas fut rejetée, avec frais, attendu que ladite intervention était en réalité une opposition à la saisie et à la vente des immeubles saisis et annoncés pour être vendus le 28 juin 1870, et qu'elle aurait dû être produite au moins quinze jours avant la vente. Le 30 mars, jugement fut rendu sur la motion, renvoyant l'intervention avec frais. C'est de ce jugement dont l'intervenant appelle. Les parties, demandeur et opposant, étaient engagés dans une contestation relativement au titre de la propriété saisie; une opposition avait été faite et produite régulièrement, demandant la nullité de la saisie, attendu que l'opposa. Les prétendait propriétaire, et alléguait un titre; de son côté, le demandeur prétendait que la saisie était bonne, et que la propriété appartenait au défendeur saisi. Dans cette contestation, l'intervenant, qui avait seul droit à la propriété, avait le droit d'intervenir, pour repousser les prétentions des parties en contestation, et faire constater son droit exclusif à la propriété, et, par suite, faire renvoyer les prétentions de l'opposant et du demandeur. L'intervention fut allouée par le juge MACKAY. Cette intervention, une fois admise, ne pourrait être rejetée que d'après la procédure ordinaire sur le mérite. L'intervenant avait le droit de voir à ce que le jugement ne fut pas rendu, adjugeant sa propriété à l'opposant ou au défendeur, et il ne pouvait le faire que par intervention. Cette interventiou ne pouvait être renvoyée qu'après une contestation, et non pas sur une simple motion.

BÉTOURNAY, for plaintiffs:

Le demandeur fit émaner un bref d'exécution de terris, en vertu duquel les rentes constituées représentant les cens, rentes et autres droits seigneuriaux des seigneuries de St Marc, de Cournoyer et Contre-Cœur, furent saisies sur John Fraser, un des défendeurs. Par la loi, ces rentes sont immeubles, et, pour en faire faire la vente par autorité de justice. il faut suivre les règles indiquées et données pour la vente des biens immeubles. La vente fut fixée pour le 28 juin 1869, mais elle ne put avoir lieu, par suite d'une opposition afin d'annuler faite et produite par Alexandre Fraser. Après la production de cette opposition, le demandeur la contesta, et la cause fut inscrite pour enquête et mérite, et les parties entendues le sept février dernier, le juge Beaudry sur le banc. Le huit, savoir, le lendemain du jour que cette cause avait été entendue et prise en délibéré, l'intervenant fit signifier à l'avocat du demandeur une requête en intervention, et l'intervention fut introduite au dossier, et la cause rayée du rôle des délibérés.

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Comme on le voit, les immeubles saisis sur le défendeur Fraser devaient être vendus le 28 juin 1869. Or, par son intervention produite dans la cause le huit février 1872, Henry Thomas se porte réellement opposant. Il y prend les conclusions suivantes: "Pourquoi le requérant conclut à ce " que vos honneurs lui permettent d'intervenir dans la pré-" sente cause, et à s'opposer à la vente des rentes constituées " saisies et à être vendues en vertu du bref de fieri facias de " terris, à ce que la saisie pratiquée soit déclarée nulle et de ' nul effet: à ce que lui seul, dit requérant, soit déclaré être " le vrai propriétaire des dites rentes constituées ainsi saisies, " le tout avec dépens." Il vient donc dans la cause, sous la fausse couleur d'une intervention, pour opposer la vente des immeubles saisis sur un des défendeurs, et ce en contravention directe à l'article 652 du Code de Procédure, qui statue que toute opposition à la saisie, ou à la vente des immeubles ou rente "doit être produite au plus tard le quin-"zième jour avant celui fixé pour la vente. L'opposition produite après ce terme ne peut arrêter la vente." Pour ces causes, le demandeur s'est adressé à la Cour, par motion ou requête sommaire, et a demandé le renvoi de l'intervention comme ayant été filée irrégulièrement cette motion fut accordée par jugement en date du trente mars dernier, et c'est de ce jugement que Henry Thomas demande la révision. Le demandeur soumet que ce jugement est juste. D'abord l'article suscité 652 de notre Code de Procédure est positif; il n'y a rien de plus formel. Si donc le jugement dont est appel allait être infirmé, sous prétexte que toute personne intéressée dans l'issue d'un procès pendant, a droit d'y être reçue partie intervenante, afin d'y faire valoir ses intérêts, (art. 154, C. P. C.) il s'en suivrait que l'exécution des jugemente deviendrait impossible. Il est de fait qu'une moitié des oppositions afin d'annuler n'est produite, nonobstant la déposition sous serment qui y est attachée, que pour retarder la procédure et faire obtenir du délai. Or, si la Cour soutenait les prétentions de l'intervenant, la conséquence serait que, au moment ou une opposition devrait être déboutée, un tiers interviendrait pour se substituer au lieu et place de l'opposant dont l'opposition serait sur le point d'être déboutée. Il arriverait ainsi dans la cause, en dehors de tous les délais fixés, sans produire l'affidavit requis à l'opposition, pour démontrer sa bonne foi et son droit d'opposer. Il est vrai qu'après avoir retardé les procédés pendant quatre à cinq mois, son intervention serait déboutée; mais, alors, un autre viendrait par un semblable procédé, et interventions sur interventions pourraient ainsi être introduites dans une cause. Toutes les règles et lois de procédure deviendraient

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une lettre morte, et pas un créancier ne pourrait jamais réussir à faire exécuter un jugement contre un débiteur frauduleux. Si d'un côté, un tiers peut intervenir dans une cause où il peut avoir des droits à protéger, d'un antre côté il y a des lois et des règles de procédure qui régissent le mode d'opposer une vente, et aucune vente d'immeubles ne peut être suspendue en contravention à telles lois et règles. D'ailleurs il ne peut pas y avoir préjudice; l'article 652 du Code de Procédure déjà cité prévoit à la protection des intérêts de la partie qui a négligé de re pourvoir en temps opportun.

The Court of Review, unanimously, confirmed the judg-

ment complained of $(17 J_{\cdot}, p. 33)$

LOUIS BETOURNAY, for plaintiff.

LAFLAMME, HUNTINGTON & LAFLAMME, for intervening

ACTIONS POSSESSOIRES.

COUR SUPÉRIEURE, St-Hyacinthe, novembre 1871.

Coram SICOTTE, J.

MICHEL GIRARD vs LOUIS BÉLANGER et al.

Jugé:—10. Que les prescriptions de l'ordonnance de 1667 sont encore en force, pour les actions en complainte et dénonciation de nouvel œuvre, et que l'ordonnance n'a en vue que le jugement définitif, pour maintenir en possession la partie qui a le mieux justifié être en possession.

20. Que sur les débats contradictoires quant à la possession de chaque partie, le défendeur niant les faits de trouble, l'action dégénère en une simple action de dommages qui est personnelle, ex delicto, qui

s'instruit et se juge comme toute action ordinaire.

SICOTTE, J.: La question importante et nouvelle qu'il s'agit de décider, découle de l'action possessoire. Ce n'est pas la complainte elle-même toutefois, qui est soumise, elle n'est pas encore mûre pour l'adjudication. Mais le demandeur sollicite une ordonnance préliminaire, pour contraindre à la suppression de travaux qu'il dénonce comme constituant les faits du trouble à sa posses-ion. Il demande cette ordonnance, parce qu'il prétend qu'il est exposé à un tort grave, immédiat et irréparable, sans cette injonction. Il a obtenu la concession d'un privilége d'un droit de pont et de péages sur la rivière yamaska. Plusieurs personnes paraissent s'être associées pour construire un pont sur la même rivière, pour leur utilité personnelle, en de lans des limites où, par la concession du demandeur, il est défendu de construire un pont, ou maintenir

toute autre voie de passage, et ont commencé les travaux. Le demandeur se plaint de ces travaux, comme étant un trouble à sa possession dans ses droits, et exerce sa complainte en dénonciation de nouvel œuvre. De là, se plaignant que. nonobstant sa dénonciation, les défendeurs continuent leurs travaux, sa requête pour obtenir une prohibition préalable de suspension des travaux, jusqu'à jugement définitif sur la complainte. Cette demande est repoussée comme n'étant pas justifiée par les faits, ni permise par la nature du droit de la partie. Notre législation n'a rien statué sur les pouvoirs des juges et des tribunaux, relativement aux faits et actes des citovens. dans l'exploitation de leur richesse, de leur industrie de manière à diriger d'une manière spéciale l'action du pouvoir judiciaire, quand on solliciterait des ordonnances de prohibition contre l'exercice de cette exploitation. Le Code a une disposition empruntée du Statut, qui édicte que, dans le cas où il n'y aurait aucune disposition pour faire valoir ou maintenir un droit particulier, ou une juste réclamation, toute procédure qui n'est pas incompatible avec la loi devra être accueillie et valoir. Notre Code n'a que trois articles sur la matière des actions possessoires. Le premier est dans ces termes, art. 946 : "Le possesseur d'un héritage ou droit réel, à titre autre que celui de fermier, ou de précaire, qui est troublé dans sa possession, a l'action en complainte contre celui qui l'empêche de jouir, afin de faire cesser ce trouble et d'être maintenu dans sa possession." Le Code ne contient aucune disposition sur la procédure à suivre dans les actions possessoires. La procédure prescrite avant sa promulgation est donc encore en force, telle qu'on la trouve dans l'ordonnance de 1667. L'ordonnance, au titre 18, par son premier article, donnait l'action dont parle le Code dans l'article que nous venons de citer. L'article 3 est en ces termes: "Si le défendeur en complainte dénie la possession du demandeur, ou de l'avoir troublé, ou qu'il articule possession contraire, le juge appointera les parties à former." L'article 5 du titre 171 considère et répute matières sommaires les demandes en complaintes, et toutes choses où il peut y avoir du péril en la demeure, pourvu qu'elles n'excèdent pas la somme ou la valeur de mille livres. Les jugements rendus en matières sommaires, et sur demande en complainte, sont exécutés par provision, en laissant caution, nonobstant l'appel. Notre action possessoire est celle de l'ordonnance. Le but en est le même : faire cesser le trcuble et être maintenu dans sa possession. Pothier, qui a parfaitement résumé toute la procédure sur ces incidents, dit : " Le juge, par son jugement, maintient en possession la partie qui a le mieux justifié être en possession pendant l'année, et fait défense à l'autre partie de l'y troubler à l'avenir. Ce ju-

gement pe intérêts." soit de J simplemer dure roma iugement L'ordonna avantage traité com le droit ré Pigeau: " rendre à jusqu'à ce elles se tro de demand pourrait v une chose n'aurait p jusqu'à la de fait, c'e sa faveur. résultats d porations l C'est une juges, lenr Quelle inju dans le cas résulte de naires ? Si le jugemer dans sa po la frustrat celle accor texte de lo d'obtenir : seule dem connu? M imminent, frira un to le protége moins con être moin litige dans geant son choisir les représente sidérable :

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gement peut aussi contenir une condamnation de dommagesintérêts." Ni l'ordonnance, ni les commentaires, soit de Pothier. soit de Jousse, parlent d'ordonnances provisoires, mais font simplement mention du jugement définitif. Dans la procédure romaine, on ne faisait que déclarer la maintenue par le ingement définitif sur l'action Interdictum ut possidetis. L'ordonnance qu'on sollicite donnerait au demandeur un avantage exorbitant. Il suffirait de se plaindre, pour être traité comme si on avait décidé toute la cause, et adjugé sur le droit réclamé et contesté. Comme le remarque justement Pigeau: "L'autorité de la justice n'étant interposée que pour rendre à chacun ce qui lui appartient, les parties doivent, jusqu'à ce que la réclamation soit payée, rester dans l'état où elles se trouvaient au moment qu'elle est formée: s'il suffisait de demander pour s'emparer, tout homme de mauvaise foi pourrait vexer un homme juste, en réclamant contre celui-ci. une chose qu'il soutiendrait lui appartenir, et sur laquelle il n'aurait peut-être aucun droit, pour la posséder, au moins jusqu'à la fin du procès." Le demandeur serait trop maître : de fait, c'est lui qui ferait la loi, et prononcerait jugement en sa faveur. On a vu, durant les quatre dernières années, les résultats de ce système dans les Etats-Unis. Les grandes corporations luttent à coup d'interdits prohibitoires et restitutoires Uest une course au clocher à qui commencera. On assiège les juges, leurs maisons, chaque intérêt a un juge dans son camp. Quelle injustice peut résulter du refus d'accorder l'injonction. dans le cas de dénonciation de nouvel œuvre, autre que celle qui résulte de tout retard dans l'adjudication des différends ordinaires? Si le demandeur est bien fondé dans sa dénonciation. le jugement sera défense de le troubler à l'avenir, maintenu dans sa possession, condamnation aux dominages. Est-ce que la frustration des droits du demandeur n'est pas la même que celle acce dée à tout plaideur dans toute demande? Où est le texte de loi, ou la règle déquité, qui permette au demandeur d'obtenir une ordonnance provisoire, accordant tout, sur sa seule demande, avant que son droit soit complètement reconnu? Mais le demandeur prétend que son droit est en péril imminent, que si l'interdit prohibitoire lui est refusé, il souffrira un tort considérable et irréparable, et que l'autorité doit le protéger. Le seul tort possible est une perte plus ou moins considérable de revenus, le demandeur percevra peutêtre moins de péages. C'est là tout le litige, c'est là aussi le litige dans toute action ex maleficiis. Le demandeur, en dirigeant son action contre les défendeurs actuels, n'a pas dû choisir les plus pauvres d'entre les cinq cents personnes qu'il représente comme associées pour faire une construction considérable; et, jusqu'à preuve du contraire, la présomption est que le droit du demandeur ne peut péricliter par le danger de ne pouvoir être payé des condamnations qui peuvent être prononcées contre les défendeurs. Il n'y a nul péril dans la demande, et, par conséquent, nulle raison d'intervenir d'une manière extraordinaire pour accorder un droit exorbitant. (17 J., p. 36.)

PAPINEAU & SICOTTE, avocats du demandeur.

CHAGNON & SICOTTE, BOURGEOIS & BERTRAND, avocats des défendeurs.

PRIVILEGE DE CONSTRUIRE UN PONT SUR UNE RIVIERE.

COUR SUPÉRIEURE, St-Hyacinthe, 2 décembre 1871.

Coram Hon. L. V. SICOTTE, J. C. S.

MICHEL GIRARD, demandeur, vs Louis Bélanger et al., défendeurs.

Le 5 mai 1863 Hilaire Théberge obtint de la législature, par statut spécial (26 Victoria, ch. 32), le droit de percevoir des péages sur un pont privé construit sur la rivière Yamaska, au village de St-Pie, et, entr'autres prohibitions, l'acte d'octroi défend (sect. 10) d'ériger aucun pont pour le transport de personnes, bestiaux, ou voitures, pour lucre et gain, à un mille au dessus et une demie-lieue au dessous du pont de Théberge, à peine d'une amende de 40 chelins : " pourva, ajoute-t-il, que rien dans le présent acte, n'anra l'effet de priver le public de passer la rivière dans les limites susdites, à "gué, en canot, ou autrement." sans lucre ou gain.

Jugé:—1° Que la propriété et la possession du demandeur (qui est aux droits du concessionnaire Théberge) consistent uniquement dans le droit de perception des péages et les constructions constituant le pont

2º Qu'aux termes de l'octroi, il est permis de construire un pont dans les limites du privilège du demandeur, pourvu que ce ne soit pas dans

3º Que les défendeurs, en commençant à construire dans les limites du privilège du demandeur un pont, destiné à servir de voie de passage libre, à eux mêmes, et à 400 antres as ociés, sans exiger de péages, n'ont pas érigé un pont dans un but de lucre ou gain, n'ont pas viole le privilège du demandeur, et ne l'ont aucunement troublé dans sa possession. 4º Que le gain ou lucre mentionné en l'acte d'octroi, n'est pas autre

chose que le profit représaté par le péage exigé pour passage. 5º Que le profit que retireront les défendeurs de l'usage de leur pont,

n'est pas le lucre ou profit mentionné en l'acte d'octroi. 6° Que la prohibition contenue en l'acte d'octroi ne constitue pas dans la personne du demandeur un droit réel susceptible de lui donner droit à l'action en complainte.

7º Que tout ce à quoi se réduit le droit du demandeur, dans le cas de construction d'un pont dans les limites de son privilége, dans un but de gain, est la poursuite pour l'amende imposée par l'acte d'octroi.

PER CURIAM:—Le demandeur est propriétaire d'un pont, et, d'après la charte octroyée par le statut, il a droit d'exiger

des péage travaux c dans l'éte verse et d ces travau pour les d bien appre mandeur. guère aux les actions un nom qu que l'exerc a des actio ordinaires coulant ou jours l'act et l'exercie qualifie so œuvre. Le et on peut sessoire, q dénonciati l'action p 946, l'indi réel, à titr troublé de celui qui l être maint héritage o animo sib toute actic sion; la pi une posses la possessi sion requis tion anim être telle c priété prés soire. Bon c'est déten sienne, an possession la propriét possessoire n'y a que l session, ces ces règles e anger de être prons la denir d'une corbitant.

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un pont, d'exiger des péages. Il se plaint que les défendeurs ont commencé des travaux dans la rivière, dans le but de construire un pont dans l'étendue des limites assignées pour ses droits de traverse et de péage, demande qu'il leur soit enjoint de démolir ces travaux, et, de plus, qu'ils soient condamnés à payer \$300, pour les dommages-intérêts. Il n'est pas sans importance de bien apprécier quelle est l'espèce d'action exercée par le demandeur. Car, quoique, dans nos tribunaux, on ne s'arrête ouère aux différences que le droit romain avait établies entre les actions, et qu'il ne soit pas nécessaire de les désigner par un nom quelconque, il n'en est pas moins vrai et juste de dire que l'exercice des actions découle de la nature des droits. Il y a des actions possessoires, des actions pétitoires, des actions ordinaires, fondées sur des engagements et des obligations découlant ou de la loi, ou des conventions. Le droit précède toujours l'action. La nature du droit règle donc ses conséquences, et l'exercice des actions utiles à sa protection. Le demandeur qualifie son action de complainte en dénonciation de nouvelle œuvre. Les conclusions qu'il a prises sont précises, distinctes, et on peut, sans hésitation, affirmer qu'il exerce l'action possessoire, qui, dans notre jurisprudence, est la complainte en dénonciation de nouvelle œuvre. Dans quelles circonstances l'action possessoire peut-elle être employée? Notre article 946, l'indique : " Le possesseur d'un héritage ou d'un droit réel, à titre autre que celui de fermier, ou de précaire, qui est troublé dans sa possession, a l'action en complainte contre celui qui l'empêche de jouir, à fin de faire cesser ce trouble et être maintenu dans sa possession." Il faut être possesseur d'un héritage ou d'un droit réel, à titre de propriétaire, c'est-à-dire animo sibi habendi, et qu'on soit empêché de jouir. Dans toute action possessoire, un point essentiel est donc la possession; la première chose à examiner est si l'on est troublé dans une possession réunissant les caractères exigés par la loi : car la possession a ses règles et ses effets particuliers. La possession requise est nécessairement celle accompagnée de l'intention animo sibi habendi. On peut donc affirmer qu'elle doit être telle qu'elle fasse présumer la propriété. C'est de la propriété présumée par la possession, que découle l'action possessoire. Bonjean (vol. 2.) définit ainsi la possession: "Posséder, c'est détenir une chose avec intention de la considérer comme sienne, animo domini ou animo sibi habendi, c'est alors la possession civile." La possession est inséparable de l'idée de la propriété; c'est la manifestation de la propriété. L'action possessoire n'est accordée que pour protéger la propriété. Il n'y a que la possession civile, qui donne les droits de la possession, ces droits découlent du droit de posséder. Partant de ces règles et de ces principes, il suit directement qu'il y a des choses qui ne peuvent faire l'objet d'une possession. Toute chose hors du commerce, ne peut être l'objet de la possession civile. Car dans ce cas, l'animus domini est illégal, non seulement à l'égard de ces choses, mais de plus, tout rapport à l'acquisition de la propriété par la détention et aux interdits possessoires, capable de produire le droit de la possession, manque. On ne suppose pas que la volonté d'avoir la chose

animo sibi habendi puisse exister.

Il faut, dit Bonjean, "que celui qui a recours à la complainte retinendo possessionis, ait la possession juridique proprement dite. De cette nécessité, il suit que l'action possessoire, soit d'une chose qui n'est pas dans la catégorie des choses publiques et communes. Examinons la possession du demandeur telle qu'il l'a qualifiée, et telle qu'il l'a réellement d'après les faits et la loi. Il se déclare propriétaire du pont désigné dans le statut, qui lui a octroyé le droit de prendre des péages, et qu'il est en possession, à titre de propriétaire. de ce pont et du droit d'exiger des péages. La possession est du pont et du droit de péage. Voici comme la demande qualifie et désigne sa propriété: "Un pont bâti et construit sur la rivière Yamaska, qui est navigable et flottable, et qui a toujours été une voie publique, de 180 pieds de longueur sur 18 de largeur, et le droit d'exiger des péages." On ne prétend qu'à la possession d'une construction faite sur une rivière navigable avec la permission de l'autorité. Cette possession découle du titre qu'on invoque. Ce titre doit dans la circonstance qualifier la possession, comme la nature même de la propriété, et, par conséquent, les effets du droit de posséder. Le concessionnaire est déc'aré, par le titre, propriétaire du pont, des maisons de péage, des montées et abords, ainsi que des péages. La propriété comme la possession, sont limitées au pont et aux péages. Ainsi, nulle propriété, nulle possession de la rivière, mais seulement le droit de l'obstruer, par la construction d'un pont, et le droit d'exiger péage de ceux qui passeront sur le pont. Pour exercer l'action possessoire, il faut justifier d'un trouble dans la possession du pont et des péages. Quel est le fait allégué comme constituant le trouble? C'est que les défendeurs, prétendant avoir droit de construire un pont dans les limites de la concession, ont commencé à faire des travaux dans la rivière, dans le but de se procurer un passage. Il n'y a pas dans ce fait un trouble dans la posse-sion. Il n'y a là aucune intervention quant au pont même; aucun acte qui prive le demandeur de sa jouissance ou qui l'expose à la perdre. Les travaux que les défendeurs ont faits dans la rivière, n'étant pas autorisés par l'Etat, peuvent les exposer à des accusations, à des indictments pour obstruer la voie publique, mais non à des poursuites privées de la part de toutes

personn obstruct private 1 lies for a Telle act frent un dent dan l'héritage que le po nouvel a tiellemen jouit, con ceux qui le fait qu du nouve nution à d'affaires les perso pont du c nent d'êt trouble o rivière na que ces fait, sur c aux actic possession enlevé au propriété. ture à rer crue des e Nullemen sont resté plainte m session ma sion, de ne un droit, a les person 32, 26e Vi mandeur, est corolla même proj deux prop nullement est suscept ne peut êti comme tou tions ordin TOM ossession on seulert à l'acinterdits ssession, la chose

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personnes qui se prétendent intéressées à faire enlever ces obstructions. Comme l'enseigne Blackstone: The law gives no private remedy for anything but a private wrong. " No action lies for a public or common nuisance, but an indictment only." Telle action ne compète à des particuliers que lorsqu'ils souffrent un tort considérable, personnel et actuel. Or il est évident dans l'espèce, que le pont même, ou les péages, qui sont l'héritage du demandeur, n'ont pas souffert un dommage actuel; que le pont n'est point exposé à destruction quelconque par le nouvel œuvre. La question des profits futurs, est chose essentiellement distincte et séparée de celle de la possession. On jouit, comme on le faisait auparavant, en recevant péage de ceux qui traversent. La diminution possible des péages, par le fait que, plus tard, quelques personnes pouvant faire usage du nouveau pont, n'affecte pas plus la possession, que la diminution à craindre du fait de l'établissement d'un grand centre d'affaires, qui appellerait, dans une direction toute opposée, les personnes qui étaient dans l'habitude de circuler sur le pont du demandeur. Faisons l'application des règles qui viennent d'être exposées au litige comme action possessoire. Lu trouble dont on se plaint est à raison d'entreprise sur une rivière navigable, sur chose publique et commune. La règle est que ces choses ne peuvent être possédées, que les voies de fait, sur ces choses ne donnent pas lieu entre les particuliers aux actions possessoires, parce qu'ils n'ont ni propriété, ni possession de ces choses. Le fait représenté comme trouble n'a enlevé au demandeur aucune portion de la possession de sa propriété. Il n'y a pas plainte que le nouvel œuvre est de nature à rendre le pont moins sûr, plus exposé à souffrir par la crue des eaux, à gêner l'exploitation qu'avait le demandeur. Nullement; tous ses droits de posséder, comme sa possession, sont restés ce qu'ils étaient. Ainsi tous les éléments de la complainte manquent. En vain, dira-t-on, mais, outre cette possession matérielle du pont, la défense que contient la concession, de ne pas construire de pont dans telles limites, constitue un droit, qui accorde l'exercice de l'action possessoire, contre les personnes qui feront cette construction. Section 10, chap. 32, 26e Vict. Cette défense n'ajoute rien à la propriété du demandeur, qui n'est saisi que du pont. Le droit à des péages est corollaire de la propriété du pont. Péages et pont, c'est même propriété, même possession. Il n'y a pas deux droits, deux propriétés, deux possessions. Tout fait qui n'affecte nullement la propriété et la possession du pont, si toutefois il est susceptible de pouvoir ultérieurement diminuer les profits, ne peut être atteint par l'action possessoire, mais il est soumis, comme tout fait de l'homme pouvant causer un tort, aux actions ordinaires et aux conséquences de la loi, chaque fois qu'il TOME XXIII.

s'agit de condamnations découlant d'obligations de faire ou de ne pas faire. Cette défense n'a pas créé de servitude au profit de la propriété du demandeur, sur le domaine public. Car la règle qui fait les rivières et les eaux, choses publiques et communes, fait également, qu'elles ne sont pas plus susceptibles de propriété privée, que de servitude, qui est une propriété par l'inhérence du droit de servitude à la propriété. On ne peut comprendre que de simples particuliers exercent des actions confessoires ou négatoires, les uns contre les autres, à raison de délits et de voies de fait sur le domaine public. Or la dénonciation de nouvel œuvre est, suivant le cas, ou une action confessoire, ou une action négatoire. J'ai voulu, par cette discussion, démontrer que l'action possessoire a un caractère tout particulier et des effets égalements spéciaux, et, partant, que les faits de son caractère particulier manquant, les effets ne pouvaient en découler. Les concessionnaires de privilèges exclusifs, ne possèdent pas d'après la loi commune, mais d'après un titre aussi spécial qu'il est exclusif: c'est de là qu'il faut partir pour s'assurer quand les actions ordinaires leur compètent, avec leurs avantages et leurs conséquences gérérales. Il est donc adjugé, que le demandeur n'avait pas, dans l'espèce, l'action possessoire pour sauvegarder les droits qu'il réclame. C'est ainsi que nos tribunaux ont jugé dans les décisions qu'on trouve dans les rapports. L'action de Leprohon vs Globenski, était une action personnelle, fondée sur obligation ex maleficiis, pour réparation du tort causé. (1) Celle de Lachapelle citée incidemment, était de même nature. Dans Jones vs La Compagnie du chemin de fer Stanstead, Shefford et Chambly

la compl qu'on vie inutile d quée, por rative de juge cite verra plu de notre En décid demande réellemer si toutef action en les fai**ts** c à raison o causés, il

(1) La sec intitulé : " " rivière R " pides, por " ments por "Jones, et propres fr "Richelieu, " à-dire, à qu " la proprié " sion et le t " dans la su " ger et con " dances sur " chaloupes " et aussi de " cessaires, t " tenir le dit " suivant la Statut, se lit pour l'usa ériger ou fa ' aucune voi " voitures qu " à une demi " que person " la dite rivi " Robert Jon " la valeur de " tiaux et voi " sonne ou pe " pour gages " tures à trav " contrevenai " animal **ains**i " Pourvu que " public de pa " ou autres ve des Statuts du " la compagni compagnie fut

⁽¹⁾ Par le Statut du Canada de 1847, 10 et 11 Vic., ch. 99, Edouard Martial Leprokon et Joseph Amable Berthelot furent autorisés (section 1) à construire un pont de péage sur la rivière Jésus à St-Eustache, et à charger (s. 5) certains péages, et il fut défendu (section 9) de construire un autre pont ou de pratiquer une autre voie de passage, pour gages, à une distance d'une lieue de ce pont ou de s'en servir, sous peine par ceux qui construiraient un pont ou s'en serviraient de payer à Leprohon et Berthelot des péages triples de ceux imposés par cet acte, et par ceux qui passeraient ou transporteraient quelqu'un sur ce pont de payer pour chaque personne, voiture ou animal traversé, une somme n'excédant pas quarante chelins, les pénalités devant (section 14) être recouvrées devant un ou plusieurs juges de paix, et étant réservés à Sa Majesté. Il a été jugé, sous ces dispositions, que le propriétaire d'un moulin qui a pratiqué ou fait pratiqué au moyen de bacs ou chalands, des voies de passage, et une traverse dans les limites du privilège d'un pont de péage, construit par Leprohon et Berthelot pour y traverser les gens gratuitement à son moulin, mais dans le but de se procurer des gains par la mouture de leurs grains, est passible des dommages-interêts envers le propriétaire de ce pont à raison de la perte de ses profits qui lui sont ainsi enlevés indirectement. (Leprohon vs Globensky C. S. Montréal, 28 juin 1854, DAY, J., SMITH, J., et C. MONDELET, J., P. D. T. M., p. 90; 2 R. J. R. Q., p. 385, et 8 R. J. R. Q., p. 25; et C. S. Montréal, 3l mars 1859, BADGLEY, J., 3 J., p. 310, et 8 R. J. R. Q., p. 19; et Globensky et uxor et Luskin et al., C. B. R. en appel, Montréal, 1er mars 1862. LAFONTAINE, J. en C., AYLWIN, J. (dissident), DUVAL, J., MEREDITH, J., et C. MONDELET, J. A., confirmant le jugement de C. S., 6 J., p. 645, et 8 R. J. R. Q., p. 22.)

ou de profit Car la et comeptibles opriété ne peut actions raison r la dée action r cette aractère partant, s effets ivilèges d'après il faut ur comérérales. l'espèce, réclame. ns qu'on lobenski, v malefichapelle es vs La

rd Martial construire 5) certains u de prati-lieue de ce ont ou s'en e ceux imquelqu'un versé, une on 14) être s à Sa Maoulin qui a de passage, nstruit par on moulin, grains, est à raison de eprohon vs MONDELET, . 25; et C. Q., p. 19; l, ler mars MEREDITH, p. 645, et 8

Chambly

la complainte fut refusée, pour des raisons analogues à celles qu'on vient d'exposer, et aussi pour d'autres raisons qu'il est inutile de rapporter. (1) L'autorité de Blackstone, qu'on a invoquée, pour justifier la présente demande, est plutôt corroborative de l'ordre de choses que je cherche à faire prévaloir. Le juge cite plusieurs passages de l'auteur, vol. 3, page 218. On verra plus tard que la doctrine de Blackstone est la doctrine de notre droit, et son enseignement celui de nos jurisconsultes. En décidant comme il vient d'être fait sur la possession du demandeur, et sur son droit d'exercer la complainte, il n'est réellement adjugé que sur une des phases de son action. Mais si toutefois il n'a pas l'action possessoire, il a toujours une action en réparation du tort qu'il prétend avoir souffert par les faits des défendeurs; et, comme il demande condamnation, à raison des dommages qu'il prétend que ces derniers lui ont causés, il reste à examiner si le tort a été commis, et quelle

(1) La section 1 du chap. 29 des Statuts du Bas-Canada de 1826, 6 Georges 4, intitulé: "Acte pour autoriser Robert Jones à bâtir un pont de péage sur la "rivière Richelieu, à Saint-Jean dans la paroisse Saint-Luc, près des Ra-"pides, pour fixer les droits de péage sur icelui, et qui pourvoit des règle-ments pour le dit pont," est en ces termes : "Il sera loisible au dit Robert "Jones, et il est par le présent autorisé et a pouvoir d'ériger et bâtir, à ses propres frais et dépens, un pont-levis solide et suffisant sur la dite rivière "Richelieu, à la ville de Dorchester, Saint-Jean, au haut des rapides, c'est "à-dire, à quelque point ou place convenable dans l'espace intermédiaire, entre " la propriété appartenant maintenant à Ephraim Molt, sur la rue de Divi-"sion et le terrain appartenant maintenant à Robert Hall, et occupé par lui " dans la susdite ville de Dorchester, communément appelée Saint-Jean, à éri-" ger et construire une maison de péage et une barrière, avec d'autres dépen-dances sur ou près du dit pont, dont la porte, pour le passage des vaisseaux, " chaloupes ou cageux, aura au moins trente pieds d'ouverture entre les piliers, " et aussi de faire et exécuter toutes autres matières et choses requises et né-"cessaires, utiles ou commodes pour ériger et construire, entretenir et sou-"tenir le dit pont projeté, maison de péage, barrière et autres dépendances, "suivant la teneur et le vrai sens de cet acte." La section 10 du même Statut, se lit comme suit: "Aussitôt que le dit pont sera passable et ouvert " pour l'usage du public, dès lors aucune personne quesconque ne pourra "ériger ou faire ériger aucun pont ou ponts, pratiquer ou faire pratiquer "aucune voie de passage pour le transport d'aucune personne, bestiaux ou "voitures quelconques, pour gain ou lucre à travers la dite rivière Richelieu, "à une demi-lieue au-dessous, et une lieue au-dessus du dit pont, et si quel-" que personne ou personnes construisent un pont ou des ponts de péage sur " la dite rivière dans les dites limites, elle paiera ou elles paieront au dit "Robert Jones, ses héritiers, exécuteurs, curateurs ou ayants cause, trois fois " la valeur des péages imposés par le présent acte, pour les personnes, bes-"tiaux et voitures qui passeront sur tel pont ou ponts, et si quelque per-"sonne ou personnes passent en aucun temps que ce soit, ou transportent " pour gages ou gain aucune personne ou personnes, bestiaux, voiture ou voi-"tures à travers la dite rivière, dans les limites susdites, tel contrevenant ou "contrevenants encourront et paieront pour chaque personne, voiture ou animal ainsi traverse, une somme n'excédant pas quarante chelins, courant. "Pourvu que rien contenu dans cet acte ne sera censé s'étendre à priver le public de passer la dite rivière dans les limites susdites à gué ou en canot, "ou autres voitures d'eau sans lucre ou gages." Par la section 3 du chap. 107 des Statuts du Canada de 1853, 16 Victoria, intitulé: "Acte pour incorporer la compagnie du chemin de fer de Stanstead, Shefford et Chambly," cette compagnie fut autorisée à construire un chemin de fer d'un point sur le fleuve

indemnité alors doit être accordée, "Toute action, dit Bonjean suppose un droit, et la violation ou le refus du droit : de cette injure au droit d'autrui découlent toutes les actions. Cette injure peut blesser tout à la fois, l'intérêt public et l'intérêt privé, ou seulement l'un de ces intérêts. Quand un fait illicite nuit en même temps à la société et à un particulier, l'auteur est assujetti à une double satisfaction, envers la société, dont l'ordre a été troublé, satisfaction envers le particulier qui a éprouvé quelque domm ge. La satisfaction envers la société consiste en châtiments; celle envers le particulier, en une indemnité pécuniaire." Voilà bien ce qu'enseigne Blackstone. Pour déterminer s'il y a eu injure au droit d'autruit, et si indemnité est due, il faut examiner le droit de chaque partie, les conditions de leurs titres, de leur situation respective d'après la loi particulière qu'on invoque, comme d'après le droit commun. Quelle est la condition du demandeur et

Saint-Laurent, vis-à-vis la cité de Montréal, de là se rendant, dans la direction de Chambly et S'efford, au débouché du lac Memphramégog, et de là à la ligne de la province à Stanstead. Par la section 1 du chap. 185 des Statuts de 1855, 18 Victoria, intitulé: "Acte pour amender l'acte pour incorporer la "compagnie du chemin de fer de Stanstead, Shefford et Chambly, et pour "dautres objets," la dite compagnie fut autorisée à construire un embran-chement de son chemin, à partir de quelque point sur sa ligne principale, jusqu'à un point quelconque du chemin de fer du St-Laurent et du lac Champlain. Sous ces dispositions, la compagnie commença la construction d'un embranchement depuis sa ligne principa e, jusqu'à St-Jean, sur le chemin de fer du Champlain et du St-Laurent. Par la section 2 du chap. 57 des Statuts du Canada de 1858, 22 Victoria, intitulé: "Acte pour amender de nouveau "les actes relatifs à la compagnie du chemin de fer de Stanstead, Shefford et "Chambly," cet embranchement alors en voie de construction fut déclaré former partie de la ligne principale du chemin de fer de Stanstead, Shefford et Chambly. Sous les dispositions des Statuts du Bas-Canada de 1826, Robert Jones construisit un pont sur le Richelieu, vis-à-vis la ville de St-Jean; et sous les dispositions des Statuts ci-dessus cités, 16 et 18 Victoria, la compagnie de chemin de fer construisit, comme partie de l'embranchement susdit, un pont sur le Richelieu, en haut, et près de celui de Jones, dans les limites du privilège de ce dernier. Il a été jugé, sous les dispositions du chap. 51 des Statuts du Canada de 1851, 14 et 15 Victoria, intitulé: "Acte pour refondre " et régler les clauses générales relatives aux chemins de fer," dont les dispo-sitions sont reproduites dans le ch. 66 des Statuts Refondus du Canada de 1859, 22 Victoria, intitulé : "Acte concernant les chemins de fer, que, dans le cas où une compagnie de chemin de fer ne prend possession d'aucun terrain pour la construction de sa ligne, elle n'est pas tenue, avant de la construire, de donner à toutes personnes dont les propriétés ne sont pas expropriées, mais qui peuvent être affectées par la construction du chemin, un avis préalable, offrant une indemnité, et que les personnes dont les propriétés ne sont pas expropriées, mais qui prétendent éprouver des dommages par la construction du chemin, doivent se présenter et demander à la compagnie, par mandamus si elle s'y refuse, à faire procéder à établir l'indemnité, et que Robert Jones n'avait pas le droit d'obtenir la démolition du pont construit par la compagnie du chemin de fer, autorisée par la législature, et que son seul recours s'il en avait un était pour une indemnité en raison des dommages lui résultant de la mise en opération du chemin de fer. (Conseil Privé, 3 février 1872, confirmant Inise en operation du chemin de ter. (Conseil Frive, 5 levrier 18/2, confirmant le jugement de C. B. R., Montréal, 7 septembre 1869, Duval, J. en C., Caron, J., Badgley, J., Monk, J., et Stuart, J., qui confirmait le jugement de C. S., St.-Jean, 16 novembre 1866. Sicotte, J., 16 J., p. 157; 17 D. T. B. C., p. 81; 8 Moore's Privy Conneil Rep., N. S., p. 312, et 16 R. J. R. Q., p. 224.)

son dro d'exiger spéciales qui pass pêcher c construit sage, pou mende. malicieus le cas, dans un de ce fa ne pas p concessio prononce dans un b mende. Il titue la ve présumé rects, dar la chose; partie au d'amende. aussi jugé lante, et le libération. truit et ne perme tants, et même rela ne sera ii de passage gué, en car n'a que les une interp commune e s'ils sont soumis au: même. Le augmenter, contre le pu chaque ind vement ord les garantie e titre et l' a condition

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Bonjean le cette Cette 'intérêt illicite l'auteur té, dont r qui a société en une ckstone. nit, et si e partie, spective après le ndeur et

a direction de là à la es Statuts corporer la y, et pour n embranprincipale, lac Chamuction d'un e chemin de des Statuts de nouveau Shefford et fut déclare Shefford et 826, Robert St-Jean ; et la compaent susdit, les limites chap. 51 des our refondre nt les dispo-Canada de , 'que, dans neun terrain construire, priécs, mais is préalable, sout pas exconstruction mandamus obert Jones a compagnie cours s'il en sultant de la , confirmant C., CARON, ent de C. S., B. C., p. 81; 224.) son droit, d'après son titre? Droit de maintenir un pont et d'exiger des péages: c'est là sa propriété. Elle a trois garanties spéciales octroyées par la concession. 1º L'amende contre ceux qui passeront sur le pont sans payer, ou qui pourront l'empêcher de le reconstruire ou de le réparer. 2° Défense de construire aucun pont ou de maintenir aucune voie de passage, pour gain, dans les limites de la charte, sous peine d'amende. 3° Punition, comme d'une félonie: la destruction malicieuse du pont ou de ses dépendances. La concession prévoit le cas, que des personnes pourront construire un pont, dans un but de gain, et statue de suite sur la punition de ce fait, par l'imposition d'une amende. Il importe de ne pas perdre de vue que le législateur n'accorde pas au concessionnaire le droit de faire démolir le pont, et qu'il ne prononce l'imposition de l'amende que si le pont est exploité dans un but de gain. Pas de but de lucre, no hire, pas d'amende. Il n'y aura à punir que l'offense publique que constititue la voie de fait sur la rivière navigable. Le législateur a présumé que personne ne trouverait assez d'avantages indirects, dans la construction d'un pont sans péages, pour faire la chose; et du consentement du concessionnaire, qui était partie au contrat statutaire, il a vu dans la défense sous peine l'amende une protection suffisante. Le concessionnaire l'a aussi jugée suffisante et l'a acceptée. Il était la partie stipulante, et les charges s'interprètent contre lui, et au profit de la libération. La défense ne frappe que sur celui qui construit et exploite pour faire gain, for hire. Et pour ne permettre aucun doute sur les intentions des contractants, et les droits du public, on déclare, dans la clause même relative à cette défense que nonobstant, rien dans l'acte ne sera interprété de manière à priver le public du droit de passage sur la rivière dans les limites de la concession à gué, en canots ou autrement, sans payer. Le concessionnaire n'a que les droits de son titre, qui est exclusif, et doit recevoir une interprétation rigoureuse. Les droits découlant de la loi commune et de la propriété ordinaire, ne lui compètent que s'ils sont octroyés par la concession, et ils sont toujours soumis aux limitations, aux remèdes indiqués dans le titre même. Le concessionnaire d'un privilège exclusif, ne peut augmenter, agrandir ses droits, qui sont des restrictions contre le public, par des garanties accordées à la société dans chaque individu et dans tout propriétaire, d'après le mouvement ordinaire de la propriété. Ses droits sont exclusifs, ses garanties seront également exclusives et spéciales, d'après e titre et l'intention du contrat. C'est justice et de plus c'est a condition qu'il a acceptée. Il changerait sa condition, son contrat en plaçant sa propriété restreinte, son droit exclusif,

dans la catégorie des droits communs à tous et dans la condition des propriétés ordinaires, en diminuant les droits du public, par des obligations qui sont opposées au texte du contrat comme à son esprit. Nul doute que toute personne peut traverser ou fournir le moyen de traverser, dans les limites de la concession, en canot ou par d'autres voies, pourvu que paiement ne soit pas exigé pour le passage. Nul doute que le moyen qui pourra être employé est indéfini. Quand la loi a déclaré que le passage pourrait se faire, de n'importe quelle manière, est-ce pour qu'il soit restreint dans le sens du privilège et de l'exclusion? Alors pourquoi parler d'une manière si large, si on voulait limiter les moyens d'effectuer le passage? Pourquoi décréter le législateur d'imbécilité, au profit de Théberge et de ses ayants cause? Quand le législateur a tout prévu, tout réglé, de quel droit le concessionnaire ou les tribunaux interviendront-ils pour tout changer, pour faire une autre législation, un autre contrat, accorder d'autres privilèges, en donnant des interprétations contre la lettre du contrat, sous prétexte que telles expressions sont sans valeur, ou n'ont pas été comprises par le législateur. Cependant le langage est clair, précis; deux fois répété dans le même sens. Tout habitant de St Pie, peut avoir son canot ou son bac pour traverser la rivière, et il peut en permettre l'usage à toute personne. S'ils peuvent avoir chacun ce canot ou ce bac, ou autre moyen de passage, et le prêter, qui peut leur enlever le droit de s'unir par vingt ou cent, dans le but de construire tel moyen de passage pour leur convenance personnelle, et sans paiement. La somme fournie pour ces constructions n'est pas le gain dont parle le statut, et qu'il prohibe. Il est superflu de discuter pour établir cette proposition. Que cette voie de passage soit un pont, les deniers payés pour la construction ne seront pas plus le paiement prohibé par le statut. Mais voyant dans la permanence ou la voie de passage par la construction d'un pont, une chose plus susceptible de faire tort, le législateur, du consentement du concessionnaire, a infligé une amende de quarante chelins, mais seulement dans le cas où la construction aurait été faite dans un but de gain, en faisant payer ceux qui traverseraient sur le pont. Tant qu'on ne fait pas paver. pas d'amende. Les défendeurs ne sont passible d'eune amende, ne sont coupables d'aucune injure a mandeur, en maintenant un moyen de comacation à travers la rivière, pourvu qu'ils n'exigent auc paiement pour permettre le passage, pourvu que péage ne soit pas exigé. Il y aura violation du droit du demandeur, quand on fera traverser ou passer la rivière dans l'étendue de sa concession, moyennant gain, c'est-à-dire, paiement pour la passage

même. comme nuisance blique, d loi met spécial, e ces deux exorbitar titre, s'ex but avou traverser lancés co voir l'exa menceme communi car il n'y gain poss dommage y ait preu est encore mais auc causé. Pa violer le c que la lo niaires. L démontre, mages ne tort au de pas eu de franchise, déclaré no sa demand ment: "la aux droits pont const réclame, pa contre les des travau les limites destruction pour domr ssession de péages d sidérant qu tement lim

termes de l et n'est tor la conoits du xte du rsonne ans les pourvu doute nand la mporte sens du ine mactuer le ité, au e légisconcesir tout contrat, étations exprespar le eux fois ut avoir peut en r chacun prêter, ou cent, eur confournie e statut, olir cette oont, les plus le la perun pont, du conde quastruction yer ceux s payer l'a acune du decation à naiement soit pas ruand on e sa conpassage

même. Jusqu'à telle éventualité, le demandeur ne souffre que comme tous les autres citoyens, de l'obstruction et de cette nuisance sur la voie publique. Il peut requérir l'action publique, dans l'intérêt général, par les voies et moyens que la loi met à sa disposition. D'après son titre, il a un remède spécial, exclusif, contre le fait dont il se plaint. Il est limité à ces deux moyens pour sauvegarder sa propriété. Le droit exorbitant qui est réclamé, pourrait, s'il est justifié par le titre, s'exercer contre la construction d'un canot, faite dans le but avoué de le mettre au service de tous ceux qui voudront traverser la rivière, des interdits prohibitoires pourront être lancés contre la construction de tout canot ou bac, cela fait voir l'exagération des prétentions de la demande. Le commencement de travaux, dans le but de pratiquer une voie de communication sur la rivière, n'a pu causer des dommages, car il n'y a encore ni voie de communication, ni paiement, ni gain possible. Quand il s'agit de condamnation pour torts et dommages, il faut que le fait querellé ait été réalisé, et qu'il y ait preuve d'un dommage actuel. Dans l'espèce, ce dommage est encore à venir. Il y aura peut-être dommage plus tard, mais aucun dommage actuel n'a été causé et n'a pu être causé. Partant pas d'injure au droit d'autrui. L'intention de violer le droit du demandeur, si toutefois elle existe, est chose que la loi ne peut atteindre par des condamnations pécuniaires. L'examen de la cause, au point de vue de l'indemnité, démontre, d'une manière évidente, que l'action pour dommages ne peut être exercée, et qu'il ne peut avoir été causé tort au demandeur, parce que lors de l'institution, il n'y avait pas eu de voie de communication pratiquée à l'encontre de la franchise, et mise à l'usage du public. Le demandeur est déclaré non recevable dans sa complainte, et mal fondé dans sa demande d'indemnité pécuniaire. Voici le texte du jugement: "la Cour, considérant que le demandeur, comme étant aux droits du concessionnaire d'un droit de péage, sur un pont construit sur la rivière Yamaska, navigable et flottable, réclame, par la complainte en dénonciation de nouvel œuvre, contre les défendeurs, parce que ces derniers ont commencé des travaux dans le but de construire un pont dans l'étendue les limites de la concession du demandeur, concluant à la destruction des travaux commencés, et à une condamnation our dommages-intérêts. Considérant que la propriété et la ssession du demandeur consistent seulement dans le droit de péages et les onvrages qui constituent le pont même; Considérant que ces droits sont exclusifs et doivent être strictement limités dans les termes de l'octroi; Considérant qu'aux termes de l'estroi la construction d'un autre pont est prévue et n'est tontefois réprimée que par l'amende et seulement dans le cas où cette construction aurait été faite dans un but de gain : Considérant que la construction commençée ne l'était pas dans tel but, mais pour obtenir une voie de communication libre de péages. Considérant que le gain dont parle l'octroi est celui représenté par le péage exigé pour le passage: Considérant que le demandeur n'a aucune propriété, ni possession d'aucun droit réel dans et sur la rivière, et que dans les circonstances, il n'avait pas droit d'exercer la complainte et dénonciation de nouvel œuvre ; Considérant que les travaux commencés par les défendeurs n'ont établi aucune voie de communication, qu'ils n'ont pas et n'ont même pu demander et recevoir des péages et faire gain à raison d'aucune voie de communication et que le demandeur ne peut réclamer condamnation que pour dommages résultant d'un tort actuel et non d'un tort futur ou possible. Considérant qu'il n'a pas été constaté de tort et d'injure actuels et consommés par et contre les défendeurs. Déboute le demandeur de son act on, avec dépens." (4 R. L., p. 467, et 17 J., p. 263)

MM. PAPINEAU & MORRISON pour le demandeur.

MM. CHAGNON & SICOTTE, et BOURGEOIS & BACHAND, pour les défendeurs.

HYPOTHECARY ACTION.

COURT OF QUEEN'S BENCH, Montreal, 18th February, 1875.

Coram Monk, J., Taschereau, J., Ramsay, J., Sanborn, J., Sicotte, J., ad hoc.

ARSÈNE LALONDE (Plaintiff in the Court below), Appellant; and Owen Lynch et al. (Defendants in the Court below), Respondents.

Held:—1. A hypothecary creditor has a right to an action en déclaration d'hypothèque against the vendee of the property hypothecated, even though such vendee may have re-sold the property, if such re-sale be not registered.

2. Where, in an action en déclaration d'hypothèque against the first vendee he pleads and proves a re-sale not registered, and that he is no longer détenteur, he will be condemned to pay the costs of action up to the time of filing his plea, and the plaintiff will be condemned to pay the costs of contestation to defendant after plea filed.

3. It having been pleaded to an action en déclaration d'hypothèque that the defendant was no longer dét nieur, but by a deed not registered had re-sold to another, the plaintiff has a right by a new action under the same number to summon such other vendee, and to have him condemned according to law as détenteur.

The facts of this case and the arguments of appellant are stated in the factum of DORION, DORION & GEOFFRION, appellant's counsel, as follows:

Le dem Owen Lyı de l'immer avant l'in Cet acte d jamais pri l'action ét encore le plus de sû cause, et, p intervenir Owen Ly condamné droit à l'ac tendre un Lynch qui question, e Les défend n'en forma première, c et entendu rendre des elle a renve comme étai a débouté Lynch avai de l'action. Cour, consi les allégati fondée en 1872 : " La que le défe titre de pre considérant de la signifi meuble, l'ay à Beauharn considérant simulée, tel demandeur, deux jugem le titre n'est propriétaire d'aliéner ou de délaisser par le propr virait done ut de 'était nınuparle pasté, ni que comae les cune ie pu d'aupeut d'un érant nsomur de 3)

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Le demandeur a intenté une action hypothécaire contre Owen Lynch. Celui-ci a plaidé qu'il n'était pas propriétaire de l'immeuble qu'on lui demandait de délaisser, l'avant vendu, avant l'institution de l'action, à son frère, Michael Lynch. Cet acte de vente n'a jamais été enregistré, et M. Lynch n'a jamais pris possession de l'immeuble en question, en sorte que l'action était bien dirigée contre Owen Lynch, qui était encore le détenteur et possesseur de l'immeuble. Mais, pour plus de sûreté le demandeur a mis le nouvel acquéreur en cause, et, par ces conclusions, a demandé que le jugement à intervenir lui fut décieré commun, à ce que, dans le cas où Owen Lynch serait de l'argé de l'action, lui, M. Lynch fut condamné à délaisser. M. Lynch s'est contenté de plaider en droit à l'action dirigée contre lui. Le demandeur a fait entendre un témoin qui prouve que c'est le défendeur Owen Lynch qui l'a employé comme son agent pour louer la terre en question, et que c'est à lui qu'il a rendu compte des revenus. Les défendeurs n'ont fait aucune preuve. Les deux causes qui n'en formaient qu'une, la dernière étant un incident de la première, ont été inscrites à l'enquête et au mérite ensemble, et entendues comme une seule cause. La Cour a cru devoir rendre des jugements séparés. Le 27 juin 1872, (BEAUDRY, J.), elle a renvoyé l'action en déclaration de jugement commun, comme étant mal fondée en droit, et, le 8 juillet suivant, elle a débouté l'action principale, sous le prétexte que Owen Lynch avait vendu l'immeuble à son frère, avant l'institution de l'action. Voici ces deux jugements: 26 juin 1873. "La Cour, considérant que le demandeur n'a aucunement prouvé les allégations de sa déclaration, et que sa demande est mal fondée en droit, la déboute, avec dépens, &c." Le 8 juillet 1872: "La Cour, considérant que le demandeur n'a pas prouvé que le défendeur était, à l'époque de l'assignation. détenteur à titre de propriétaire de l'immeuble décrit en la declaration; considérant de plus, que le défendeur a prouvé, qu'à l'époque de la signification, il avait cessé d'être propriétaire dudit immeuble, l'ayant vendu à Messire Michael Lynch, par acte reçu à Beauharnois, devant J. Brossoit, Notaire, le 19 mai 1870, et, considérant qu'il n'y a aucune preuve que cette vente ait été simulée, tel qu'allégué par le demandeur; déboute l'action du demandeur, avec dépens, &c." Le demandeur se plaint de ces deux jugements. Sous l'empire du Code, art. 2098. celui dont le titre n'est pas enregistré, ne peut pas être considéré comme propriétaire, vis-à-vis des tiers. Il n'a pas droit de vendre, d'aliéner ou d'hypothéquer. Il ne peut pas avoir plus le droit de délaisser en justice. Le délaissement ne peut se faire que par le propriétaire ayant qualité pour aliéner. A quoi servirait donc notre système de publicité des droits réels, s'il

fallait qu'un créancier hypothécaire fut exposé, comme dans le cas actuel, à ne savoir jamais contre qui diriger son action, car rien n'empêche que Messire Lynch n'ait, lui aussi, revendu la propriété à quelqu'autre; et lorsqu'on nous indiquera ce dernier acquéreur, il se sera, à l'exemple de ses auteurs, dénanti de la propriété, pour frustrer les créanciers légitimes. Mais, s'il pouvait y avoir du doute, il semble évident que, du moment que celui, que l'on prétend être le propriétaire est mis en cause afin de voir le jugement déclaré commun avec lui, ce doute doit disparaître. Si l'action avait été dirigée d'abord contre les deux intimés, elle aurait dû assurément être maintenue contre l'un d'eux. Or, quelle différence y a t-il entre cette procédure et celle adoptée dans la présente cause? L'appelant n'en voit pas de sérieuse. Tous les jours, et souvent même par ordre de la cour, l'on met en cause des parties qui auraient dû être assignées en premier lieu. A plus forte raison, lorsque la partie demanderesse ne connaît pas (comme dans le cas actuel) les parties qui/peuvent avoir intérêt dans la cause. Le procédé adopté par l'appelant est formellement reconnu et sanctionné par l'art. 2059 du code. Ainsi, l'action principale était bien fondée. L'action en déclaration de jugement commun l'était également. C'est à tort que Messire Lynch l'a contestée. Le jugement devait condamner Owen Lynch à délaisser et déclarer le jugement commun avec Messire Lynch.

LAFLAMME, Q. C., for respondents: Quant à la première action, il n'est nullement prouvé que Owen Lynch fût propriétaire, mais il est prouvé au contraire que Michael Lynch l'était longtemps avant l'institution. La deuxième action contre Michael Lynch, en déclaration de jugement commun, ne pouvait non plus être maintenue pour plusieurs raisons: 1° Aucun jugement n'avait été rendu contre Owen Lynch dans la première action: 2° l'action intentée contre Owen Lynch, comme tiers détenteur de la propriété en question, était pour la même créance hypothécaire pour laquelle Michael Lynch est poursuivi, comme détenteur de la même propriété: 3° le demandeur ne pouvait poursuivre Michael Lynch par la même action que celle intentée contre Owen Lynch, (quoique ladite action fut signifiée subséquemment), sans qu'il alléguât qu'ils avaient acquis la propriété ensemble et qu'ils étaient propriétaires conjoints : 4º le demandeur ne pouvait intenter la seconde action, avant d'avoir discontinué

la première—ce qu'il n'a pas fait.

TASCHEREAU, J.: Le présent appel est de deux jugements rendus par la Cour Supérieure, à Montréal, renvoyant l'action principale de l'appelant contre l'intimé Owen Lynch, et une autre action portée, en la même cause, contre l'intimé, Michael

Lynch, er défense q deux ac Moise La passé pa somme d terre dés L'appelar poursuivi intérêts, e terre hy principal, devant E plus prop mai 1870, pardevant de la prod l'appelant il dénonç fense de cause, à la lui serait de contes en droit, contre lui l'appelant, causes d'a simultané acquis la être pour discontinu titre d'acc Michael L Supérieure claration d Et, le 8 ju d'hypothèe son institu priétaire e Lynch. L defaut d'e intimés, ca son titre, i tiers eût instant, ig

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gements l'action i, et une Michael Lyach, en déclaration du jugement commun, à la suite de la défense que fit Owen Lynch. Les faits donnant lieu à ces deux actions sont les suivants: Le 14 novembre 1873, Moïse Lalonde reconnut devoir à l'appelant, suivent acte passé par devant J. O. Bastien, et confrère, notaires, la somme de \$1787.70, et, pour sûreté, il hypothéqua une terre désignée à l'acte qui fût régulièrement enregistrée. L'appelant n'ayant reçu que \$7 à \$800, accompte sa de dette, poursuivit Owen Lynch en mai 1871, pour \$954, plus certains intérêts, en déclaration d'hypothèque, comme détenteur de la terre hypothéquée, et comme l'ayant achetée du débiteur principal, Moïse Lalonde, par acte du 19 août 1869, reçu par devant Bastien, notaire. Owen Lynch, plaida qu'il n'était plus propriétaire, ni en possession de la terre, vu que, le 19 mai 1870, il l'avait vendu à Michael Lynch, par acte exécuté pardevant Brossard, notaire. Sur cette défense, accompagnée de la production de l'acte de vente invoqué par Owen Lynch, l'appelant mit en cause Michael Lynch, auquel, par son action, il dénonça toute sa procédure contre Owen Lynch, et la défense de ce dernier, et il concluait, par son action de mise en cause, à la reddition contre Michael Lynch d'un jugement qui lui serait commun avec Owen Lynch, et sans dépens, à moins de contestation de sa part. Michael Lynch, par une défense en droit, plaida que Lalonde n'avait aucun droit d'action contre lui, sous les circonstances, et, notamment, parce que l'appelant, ayant poursuivi Owen Lynch, pour les mêmes causes d'action, lui, Michael Lynch ne pouvait être poursuivi simultanément avec Owen Lynch, sans allégner qu'ils avaient acquis la propriété ensemble, et que, lui, l'intimé, ne pouvait être poursuivi sans que l'action contre Owen Lynch fut discontinuée. Notons ici qu'il n'y a aucune preuve que le titre d'acquisition d'Owen Lynch, non plus que celui de Michael Lynch aient été enrégistrés. Le jugement de la Cour Supérieure, rendu le 27 juin 1872, a renvoyé l'action en déclaration de jugement commun comme non fondée en droit. Et, le 8 juillet 1872, la cour a renvoyé l'action en déclaration d'hypothèque contre Owen Lynch, sur le principe que, lors de son institution le défendeur Owen Lynch n'était plus propriétaire de l'immeuble, et qu'il l'avait vendu à Michael Lynch. La difficulté qui s'élève est, je crois, à raison du défaut d'enregistrement des deux titres d'acquisition des intimés, car il est évident que, si Owen Lynch eût enregistré son titre, il ponvait vendre à un tiers, et que, si le titre de ce tiers eût été enregistré, l'appelant n'aurait pu, pour un instant, ignorer qu'Owen Lynch s'était dégagé de toute responsabilité en vendant à Michael Lynch. Nous avons donc à considérer quelle était la position respective des deux

parties (appelant et intimés) à l'époque de l'institution de la première action et de la seconde action. La preuve ne constate pas bien clairement qu'Owen Lynch était possesseur de facto; mais qu'il possédait soit en son nom, soit au nom de son frère Michael Lynch. Le demandeur appelant avait donc droit de diriger contre lui une action en déclaration d'hypothèque, et s'il est rencontré par un plaidoyer de la part d'Owen Lynch tel que celui que j'ai indiqué, on ne peut en faire un reproche à l'appelant, à moins qu'on ne soit fondé à lui dire que vu que le bureau d'enregistrement n'indiquait aucune mutation du propriétaire originaire, il (l'appelant) devait porter son action contre Moïse Lalonde et faire saisir l'immeuble sur lui. Il me paraît impossible de croire à la légalité de cette prétention, car je n'interprète pas l'article 2098 comme rendant absolument nul le titre de l'acquéreur nouveau et non enregistré. La nullité qui pourrait être la conséquence de ce défaut d'enregistrement n'est pas absolue. Le nouvel acquéreur est toujours devenu propriétaire, même par le seul consentement, suivant l'artic'e 1472 du Code Civil, mais il ne peut prescrire, il ne peut vendre, ou hypothéquer l'immeuble, au détriment de ses créanciers, ni de ceux de son auteur, mais s'il possède de facto, il fait les fruits siens, il peut poursuivre en complainte, en réintégrande, il peut porter une action négatoire ou confessoire, il peut protéger sa possession par tous les moyens légaux (ainsi décidé, en appel, en 1872, dans la cause de Laterrière & Gagnon, en appel.) Ainsi donc, l'appelant n'était pas en défaut, il a fait ce qu'il lui était possible, et il porte une première action, et est informé que Michael Lynch est propriétaire et possesseur, et il le poursuit. Il est dans la position d'un propriétaire qui a poursuivi au pétitoire un homme qu'il trouve en possession de sa propriété, mais qui plaide n'être que locataire, et indique le nom du véritable détenteur à titre de propriétaire. Dans ce cas, le demandeur a le droit de mettre en cause le propriétaire indiqué, et la procédure se continue avec lui. L'article 2059 du Code Civil sanctionne cette procédure, en disant, au chapitre de l'action hypothécaire, que "Lorsque " l'immeuble est possédé par un usufrvitier, l'action doit être " portée contre le propriétaire du fonds et contre l'usufruitier " simultanément, ou dénoncé à celui des deux qui n'a pas été " assigné en premier lieu." Nous avons fréquemment vu nos tribunaux supérieurs (cour d'appel, cause Soucy vs Tétu, (ordonner, même proprio motu, la mise en cause d'une partie intéressée, et que l'on avait négligé d'assigner en la cause : les autorités de Pothier, au traité de l'hypothèque, et du nouvenu Denizart, justifient, cette procédure. Appuyé de ces autorités et de ces précédents, l'appelant met en cause l'intimé,

Michael | l'encontre ancun to contester demandé délaisser, rencontra A mon po du Code adoptée : prudence. les précéd ment et n dont le tit ne peut enregistré ment d'u " héritage " en était priétaire que subs qui déclar " ment." l'appelant tradictoire Notre syst comme l'a créancier : qui diriger que de por sur lequel disposé à r

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Michael Lynch, et le somme de venir y protéger ses droits à l'encontre de l'appelant. Cet intimé, Michael Lynch, n'éprouve aucun tort de cette mise en cause, il n'était pas forcé de contester, il n'était tenu de le faire qu'autant qu'on aurait demandé contre lui une condamnation personnelle. Il pouvait délaisser, comme il pouvait vendre, et en delà il ne rencontrait aucun obstacle dans l'article 2097 du Code Civil. A mon point de vue, il me paraît évident qu'avec un article du Code Civil tel que celui sous le 2098, la procédurs adoptée par l'appelant était non seulement dictée par la prudence, mais justifiée par les règles de la procédure, les précédents et l'ensemble de notre système d'enregistrement et notamment 1° par l'article 2098 qui déclare que celui dont le titre d'acquisition d'un immeuble n'est pas enregistré, ne peut vendre efficacement jusqu'à ce que son titre soit enregistré. 2° par l'article 2088 qui énonce que l'enregistrement d'un "droit réel ne peut nuire à l'arquéreur d'un "héritage qui alors (et avant la mise en force du code) "en était en possession ouverte et publique à titre de pro-" priétaire, lors même que son titre n'aurait été enregistré que subséquemment." 3° par l'article 1472 du Code Civil qui déclare que "La vente est parfaite par le seul consente-'ment." Je crois qu'un jugement tel que celui que sollicite l'appelant réconcilierait ce qui semblerait de prime abord contradictoire en les trois articles du code que je viens d'indiquer. Notre système de publicité des hypothèques serait illusoire, comme l'appelant le dit dans son factum, s'il fallait qu'un créancier hypothécaire fut exposé à ne jamais savoir contre qui diriger son action, ou à payer une masse de frais avant que de pouvoir découvrir le seul détenteur réel de l'immeuble sur lequel il a des droits hypothécaires à réclamer. Je suis disposé à renver-er les jugements dont e-t appel et à accorder à l'appelant le bénéfice de ses conc'usions.

Sanborn, J.: With respect to the incidental demand, I think the judgment of 27th June, 1872, correct. It was not the proper subject of an incidental demand. Either Michael Lynch was the sole détenteur, or he was not. If he was sole détenteur, an action should have be in instituted against him alone. If he was not, certainly there was no ground for action against him alone or jointly with Owen Lynch. The pretensions of Owen Lynch were that Michael Lynch was the sole proprietor. If so, the action against Owen Lynch should have been abandoned as misdirected, and a suit taken against Michael Lynch alone. Bioche says "Les tribunaux ne sauraient admettre comme demandes incidentes que celles qui sont nées depuis l'action principale, ou qui lui servent de reponse ou enfin celles qui ont avec elle une connexité évi-

dente, et non celles qui devraient former une action principale; autrement on pourrait se soustraire au préliminaire de conciliation et éterniser les instances." 4 Bioche, Dict. de Pro. 515, "incident." The judgment of 8th July, 1872, appears to me erroneous, and should be reversed, and judgment should go against Owen Lynch. The alienation to Michael Lynch was never perfected by delivery. Under Art. 1027 C. C., taken in connection with Art. 2098 C. C. it seems that in the case of real property there must be actual delivery or registration to constitute alienation, so far as third parties are concerned. Under this view of the law the action was properly directed against Owen Lynch, who was, as respects appellant, proprietor, and appellant had the right to treat him as such in a hypothecary action to enforce payment of

his debt as against the property.

The judgment was as follows: "Considérant que l'appelant, par son action en déclaration d'hypothèque, en Cour de première instance, réclamait, contre Owen Lynch, comme détenteur et possesseur de l'immeuble ci-après désigné, une somme de \$1,566.66, plus les intérêts à neuf pour cent, sur la somme de \$950, et à six pour cent sur une autre somme de \$561.66, intérêts échus, et le tout acompte du 22me jour de mai 1872, balance due par une obligation au montant de \$1,787.70 consentie en faveur de l'appelant, le 14 novembre 1863, par Moïse Lalonde et Virginie Lacombe, son épouse, et passé par devant Bastien et confrère, notaires publics, que les débiteurs s'obligèrent payer au demandeur le premier jour de novembre 1864, et pour sûreté du paiement de laquelle somme, capital et intérêt au taux de neuf pour cent après son échéance, les débiteurs hypothéquèrent spécialement (here follows a description of the land); Considerant que Owen Lynch pour défense à cette action plaida qu'il n'était plus possesseur du dit immeuble ci-dessus en second lieu désigné. ni propriétaire d'icelui, et qu'il l'avait vendu, le ou vers le 19 mai 1870, à Michael Lynch, suivant acte de vente passé à Beauharnois, par devant Brossoit, notaire public; Considérant que l'acte d'obligation ci-dessus mentionné a été bien et dûment enregistré, mais que ni l'acte de vente par Moïse Lalonde à Owen Lynch, ni celui par Owen Lynch à Michael Lynch, de l'immeuble en second lieu ci-de-sus désigné, n'ont été enregistrés; Considérant qu'en l'absence de l'enregistrement du dit acte de vente par Owen Lynch à Michael Lynch, l'appelant Arsène Lalonde pourrait ignorer que Owen Lynch se fût dessaisi de la propriété du dit immeuble en faveur de Michael Lynch, et qu'il pourrait légalement instituer contre ce dernier l'action qu'il a incidemment portée contre lui ; Considérant que la preuve en cette cause établit que lors de l'ins-

titution nier n'ét en secon et aussi contre li rant qu' appel, sa du 8 juil renvoyar lui et en jugement rieure au contre O lant ses moment e sivement, frais de d qu'à juge aussi la m sent appe en second au paieme \$954 à n compter c suite de l'a Supérieur lant sur sc immeuble vendu en ment, suiv principal, i thèques, si dette susdi Lynch ser compter de non, et ledi dit délaisse condamne somme de l et sur \$56 1860, et les a contesté que devant personnelle frais et dé

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titution de l'action de l'appelant contre Owen Lynch, ce dernier n'était plus possesseur animo domini du dit immeuble en second lieu désigné, et que Michael Lynch en était alors. et aussi au moment de l'institution de l'action de l'appelant, contre lui Michael Lynch, propriétaire et détenteur; Considérant qu'il y a erreur dans les deux jugements dont il est appel, savoir: l'un en date du 27 juin 1872, et l'autre en date du 8 juillet 1872, de la Cour Supérieure siègeant à Montréal, renvoyant les deux actions de l'appelant avec dépens contre lui et en faveur des intimés; cette cour casse et annule lesdits jugements, et rendant les jugements que ladite Cour Supérieure aurait dû rendre, renvoie l'action de l'appelant intentée contre Owen Lynch et condamne ce dernier à payer à l'appelant ses frais d'action en ladite Cour Supérieure jusqu'au moment de la production de la défense de Owen Lynch, inclusivement, et condamne l'appelant à payer à Owen Lynch ses frais de défense depuis la production de sa dite défense, jusqu'à jugement inclusivement en ladite Cour Supérieure, et aussi la moitié des frais encourus par Owen Lynch sur le présent appel. Et cette cour déclare l'immeuble ci-dessus désigné en second lieu affecté et hypothéqué en faveur de l'appelant au paiement de ladite somme de \$1,515.66? avec intérêt sur \$954 à neuf pour cent, et sur \$561.663 à six pour cent à compter du 29 mai 1871, et des frais encourus sur la poursuite de l'action de l'appelant contre Michael Lynch en Cour Supérieure, et pour une moitié de ceux encourus par l'appelant sur son appel. Condamne Michael Lynch à délaisser ledit immeuble en second lieu désigné comme susdit, pour être vendu en ju tice, sur le curateur qui sera nommé au délaissement, suivant la loi, pour être l'appelant payé de son dû, en principal, intérêts et frais susdits, suivant ses droits et hypothèques, si mieux n'aime Michael Lynch payer à l'appelant sa dette susdite, avec les intérêts et frais susdits, ce que Michael Lynch sera tenu d'opter et accompplir sous quinze jours à compter de la signification sur lui du présent jugement, si non, et ledit délai expiré sans que Michael Lynch ait fait ledit délaissement ou effectué le paiement susdit, cette cour le condamne personnellement à payer au dit appelant ladite somme de \$1,515.66\frac{3}{4}, avec intérêt sur \$954, à neuf pour cent, et sur \$561.66\frac{3}{4} à six pour cent, le tout à compter du 29 mai 1860, et les frais ci-dessus adjugés. Et vu que Michael Lynch a contesté l'action du dit appelant, tant en Cour Supérieure que devant cette Cour, icelle cour condamne Michael Lynch, personnellement, dans tous les cas, à payer à l'appelant les frais et dépens encourus par lui en Cour Supérieure sur sa

dite action, et la moitié des frais encourus par l'appelant sur l'appel en cette cause. (20 J., p. 158 et 17 J., p. 38.)

DORION, DORION, & GEOFFRION, for appellant.

LAFLAMME, HUNTINGTON, MONK & LAFLAMME, for respondent.

PROCEDURE.-DEFENSE EN DROIT.

COUR SUPÉRIEURE, Montréal, 28 juin 1872.

Coram MACKAY, J.

LAROCQUE vs LAJOIE.

Jugé:—Que le syndic à une faillite poursuivi par une demande en saisie-revendication, est bien fondé à repousser cette action par une défense au fond en droit, en autant qu'en vertu de l'acte de faillite, aucune demande en saisie-reven iteation ne peut être poitée. (1)

A l'action du demandeur, pour saisir-revendiquer des meubles sujets à son privilège de bailleur, le défendeur plaida une défense en droit, alléguant "qu'il appert, par les allégations "de la déclaration, que le défendeur est assigné en sa qualité "de syndic à la faillite etc., et qu'en vertu de l'acte de "faillite de 1869, et ses amendements, le demandeur n'a "aucun droit d'action en saisie-revendication contre le défendeur, ès-qualité; que les faits allégués par le demandeur ne "lui donnent aucun droit d'action contre le défendeur, "ès-qualité, mais qu'en vertu, et par suite des dites allégations, le demandeur n'a droit de procéder contre le défendeur, deur que par une requête sommaire, présentée à l'un des "juges de cette honorable Cour." Les parties ayant été entendues en droit, la Cour a maintenu la défense en droit, et a débouté le demandeur de son action, avec dépens.

PER CURIAM: This is an action of revendication, by a creditor against an assignee, to obtain possession of certain effects. The plea is a demurrer, on the ground that, by section 50 of the Insolvent Act of 1869, the remedy provided is by summary petition in vacation, or by a rule in term, and not by suit. The plaintiff replies that it could not be intended to take away the common law remedy by suit; but the object of the section referred to is clear; namely, to prevent seizure, attachments and suits by numbers of creditors, at expenses ruinous to the estate, and to substitute therefor the simpler and less expensive process of petition or rule. The plaintiff is

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in my opinion, wrong in bringing the action in the present form, and must be non-suited. Demurrer maintained.

Le jugement est comme suit: "The Court, considering the reasons of said défense good, doth, adopting the saine, maintain the défense en droit and dismiss plaintiff's action, with costs." (17 J., p. 41; 2 R. C., p. 477.)

PAGNUELO, avocat du demandeur.

DUHAMEL, RAINVILLE et RINFRET, avocats du défendeur.

BILLET PROMISSOIRE.—PREUVE.

COUR DE CIRCUIT, Montréal, 13 mars 1872.

Coram BEAUDRY, J.

Dupuis vs Marsan.

Jugé:—1. Qu'un billet promissoire au-dessous de \$50, fait à ordre, peut tre valablement transporté, pour valeur reçue, par celui à l'ordre duque il est fait, sans être endossé par ce dernier. 2. Que la preuve de tel transport peut se faire par témoin.

Le demandeur réclamait du défendeur la somme de \$35, montant d'un billet fait par ce dernier, à l'ordre d'un tiers W. Marsan) qui avait, avant son échéance, transporté le billet u demandeur, en lui en faisant simplement la remise, sans vouloir l'endosser. Le défendeur plaida par une défense en lroit, prétendant, en s'appuyant sur l'art: 2286, C. C., B. C. u'un billet fait à ordre, ne peut être valablement transporté ans endossement.

PER CURIAM: L'art. 2286 C.C., dit: qu'un billet promissoire, ait à ordre, peut être transporté au moyen d'un endossement, pais ne limite pas que tel transport ne puisse se faire autrepent. Défense en droit rejetée, et preuve du transport du illet par simple délivrance admise. (17 J., p. 42.)

Ls. Piché, avocat du demandeur. J. N. Pauzé, avocat du défendeur.

REQUETE CIVILE.—JUGEMENT DE DISTRIBUTION.

Cour Supérieure, en Revision, Montréal, 31 mai 1872.

Coram Berthelot, J., Mackay, J., Torrance, J.

DOUTRE et al., vs Bradley et al., et divers opposants, et DAME JANE ALLISON, et vir., requerants sur requête civile, et J. BTE. DORION, repondant.

Jugé:—Que, sur une requête civile, une partie qui allègue du dol dans la procédure, adoptée pour obtenir l'homologation d'un jugement de distribution, en sera relevée, et il lui sera permis de contester les collocations.

Par son jugement, rendu à Montréal, le 29 février 1872, la Cour Supérieure, (BEAUDRY, J.,) accorda une requête civile présentée par Jane Allison et vir, pour faire mettre de côté un jugement de distribution homologué le 25 mai 1871. Ce jugement est comme suit: "La Cour, considérant qu'il y a " lieu, sous les circonstances prouvées, à relever la requérante "et lui permettre de contester la collocation de Jean Baptiste "T. Dorion; met au néant le jugement rendu le 26 mai 1871, "homologuant l'ordre de distribution préparé par le proto-" notaire, et remet les parties au même et semblable état "qu'elles étaient le 23 de mai 1871, le tout sans frais." L'opposant Dorion porta ce jugement en Cour de Révision, et prétendit, par son factum, qu'aucune preuve de dol ne justifiait l'octroi de cette requête civile, et, quoique la Cour Supérieure avait dit qu'il y avait une irrégularité dans les procédés, que le rapport de collocation avait été homologue avant l'expiration des délais; néanmoins l'opposant prétendait qu'il avait été homologué après l'expiration de onze jours. Dans son factum, Jane Allison s'appuyait sur le dol par elle allégué en sa requête civile, et citait les articles 505 et 761 du Code de Procédure. Le jugement de la Cour de Révision, à Montréal, a confirmé le jugement, avec tous les dépens

PER CURIAM: Requête civile par Mme Allison, contre un jugement de distribution, colloquant, à son préjudice, Dorion créancier hypothécaire. Outre les motifs allégués dans la requête, et fondés sur une entente entre les avocats des parties, pour une prolongation des délais de contestation la Cour trouve qu'il y a une autre raison pour accorder la requête, c'est que le greffier n'ayant pas affiché au greffe l'avis de quatre jours que requiert le Code, le jugement a été homelogué trop tôt. La motion signée par certaines parties demandant l'homologation de consentement ne peut lier que case being n ceux qui l'ont signée, et, comme il apparaît, au certificat du pf the adm

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Ex parte 1 SILIER

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TORRANC for the non the adminis having resig his demand régistrateur, d'autres intéressés ayant droit à l'avis, la motion est sans effet, quant à eux. Le jugement de la Cour Inférieure accueillant la requête civile est confirmé. Ce jugement est comme suit: "La Cour Supérieure, siégeant comme Cour de "Révision, considérant, qu'il n'y a point d'erreur dans le "jugement du 29 février 1872, confirme, par les présentes, "le dit jugement, pour les motifs qui y sont donnés, et, "en outre, parce que le jugement rendu par le protonotaire, "le 26 mai 1871, a été rendu sans que les délais pour son "homologation aient été observés, et sans qu'il apparsisse de "consentement des créanciers inscrit au certificat d'hypo-"thèques produit avec le rapport du shérif." (17 J., p. 42.)

JETTÉ, avocat des requérants sur requête civile.

Kelly & Dorion, avocats du répondant.

EXECUTEUR TESTAMENTAIRE.

COUR SUPÉRIEURE, EN CHAMBRE, Montréal, 8 juillet 1872.

Coram Torrance, J.

Ex parte François Chalut et al., requérants, et Pierre Persilier dit Lachapelle, répondant.

Jugé:—Que les dispositions de l'article 924 du Code Civil, au sujet de la nomination d'un exécuteur testamentaire, pour remplacer ceux qui ont cessé d'exercer leurs pouvoirs, ne s'appliquent pas aux cas qui peuvent se présenter sous les dispositions d'un testament fait antérieurement à la promulgation du Code Civil.

Les requérants, grevés de substitution, par le testament de Paschal Persilier dit Lachapelle, père, exécuté le 8 avril 1871, Decelles, N. P., présentèrent une requête au juge, alléguant que tous les exécuteurs et administrateurs testamentaires avaient cessé d'exercer leurs fonctions depuis quelques années, soit par décès, soit par résignation fondée sur les infirmités de l'âge. Le répondant s'objecta à cette nomination, et prétendit que les dispositions de l'article du Code Civil 924, ne s'appliquent pas aux testaments faits et exécutés avant la promulgation de ce Code.

TORRANCE, J.: This is an application by Chalut and others, for the nomination of an administrator, to take the place of the administrators of the late Lachapelle, these administrators having resigned their office. The intervening party opposed this demand, alleging that, under the old law, the will in this case being made before the Code came into force, in the event of the administrators appointed by the testator refusing

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to act, the execution of the will is left to the legatees themselves. Under the old law, there was no power in the Courts to nominate an executor, where, from any cause, the executor appointed by the will did not act. The petition is therefore rejected. A decision on the same point was rendered in the case of ex parte Masson, in which Mr. Justice MACKAY, two years ago, decided, as I am deciding to-day, that, with regard to these old wills, the Courts have no jurisdiction in the matter.

Le jugement est comme suit: Considering that the matter in question can only be governed by the law anterior to the coming into force of the Civil Code, and that such anterior law does not justify the granting of the petition of the petitioners; the said petition is rejected, without costs.

(17 J., p. 44.)

LAFRENAYE, avocat des requérants. BÉLANGER, avocat du répondant.

POURSUITE SUR BILLET .- PROCEDURE.

COUR SUPÉRIEURE, Montréal, 29 février 1872.

Coram MACKAY, J.

HUDON vs CHAMPAGNE.

Jugé:—Que, sur un billet daté à Montréal, quoique réellement fait et signé par le défendeur dans un autre district, une action en recouvrement du montant du billet contre le faiseur, peut être attaquée, par une exception déclinatoire, sans être accompagnée d'un affidavit, conformément à l'article 145, du Code de Procédure Civile.

Le demandeur réclamait du défendeur, résidant dans le district de Richelieu, et assigné dans ce dernier district, le montant d'un billet promissoire souscrit par le défendeur, et signé par lui, à Sorel, mais daté comme étant fait à Montréal. Le defendeur plaida une exception déclinatoire, et, à l'appui d'icelle, il alléguait: "que le défendeur est du district de Richelieu, et non de celui de Montréal; que la cause d'action n'a pas originé dans le district de Montréal, et que le billet qui en fait la base, bien que daté à Montréal, a été signé par le défendeur dans le district de Richelieu, et ce, à la connaissance des demandeurs." Le 23 février 1872, le demandeur fit motion pour faire rejeter cette exception déclinatoire, sur le principe qu'elle n'était pas accompagnée d'un affidavit, en conformité aux dispositions de l'article 145, du Code de Procédure Civile. Le demandeur prétendait qu'en supposant que le

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matter to the nterior of the t costs. billet aurait été signé dans le district de Richelieu, le seul fait que le défendeur a signé le billet comme étant fait et souscrit à Montréal, établit, de la part de ce dernier, un consentement formel de devenir justiciable du district de Montréal, à l'égard du dit billet, et de la transaction qui en est la considération; que le billet est un contrat volontaire, qui lie le défendeur, et ce contrat, à lui seul, forme toute la cause de la présente action, et, d'après ce contrat, il résulte que le défendeur a voulu, et a consenti que la présente action prit naissance dans le district de Montréal. Les parties ayant été entendues sur cette motion, la cour la rejeta, avec dépens. (17 J., p. 45; 2 R. C., p. 233.)

CARTIER, POMINVILLE & BÉTOURNAY, avocats du deman-

ROBIDOUX & BÉIQUE, avocats du défendeur.

CORPORATIONS MUNICIPALES, - DELITS.

Cour Supérieure, Montréal, 30 septembre 1871.

Coram BEAUDRY, J.

T. S. Brown et J. K. Springle, demandeurs, vs LA Corpo-RATION DE MONTRÉAL, défenderesse,

Jugé:—Qu'un corps municipal censurant la conduite des commissaires nommés dans une instance où il est partie, n'agit pas alors comme corps légiférant, mais bien comme corps administratif.

Que les corporations municipales sont régies, en matières civiles, par les règles qui régissent les corporations ordinaires, et sont soumises à l'art. 356 C. C.

Que la Corporation de Montréal est corporation politique, en autant qu'elle a droit de faire et promulguer des règlements ou lois de police, t corporation civile en tant qu'administrant les intérêts de ses habi-ants, et sous ce rapport soumise au droit commun.

Que, comme corporation civile, elle est responsable comme tout autre ndividu, pour les actes de ceux qui sont autorisés à la représenter; et

artant, passible de poursuite pour délit, et pour libelle.

PER CURIAM: Les demandeurs allèguent que, le 14 avril 868, ils ont été nommés, conjointement avec Damase Masson, ommissaires, pour déterminer l'indemnité à être accordée à Ch. Wilson, pour l'expropriation d'une partie de ses propriétés evant servir à l'élargissement de la rue St. Joseph; qu'après oute les formalités remplies, et avoir entendu les témoins, ant du côté de la Corporation, requérant l'expropriation, que u côté de Wilson, les commissaires, moins l'un d'eux, Damase lasson, en sont venus à la conclusion préliminaire d'accorder Wilson \$19,500; qu'après cette appréciation préliminaire, ils

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convoquèrent les parties intéressées, c'est-à-dire, celles qui devaient payer l'amélioration projetée, pour les entendre, afin de modifier leurs conclusions au besoin : qu'après avoir entendu les dites parties, les dits commissaires réduisirent l'indemnité à \$13,669, l'un d'eux, Damase Masson, différant; que, malgré toutes les précautions qu'avaient prises les deux commissaires demandeurs, la défenderesse, le 22 août 1868, passa une résolution de blâme sur la conduite des deux commissaires, qui, prétendait-elle, avait forfait à leurs obligations comme commissaires; qu'en conformité à cette résolution calomnieuse, injurieuse à la réputation des demandeurs, et qui fut publiée dans les journaux, la défenderesse a présenté, devant le juge, le 10 août 1868, une requête appuyée sur la dite résolution, et où, malicieusement, elle néglige de rapporter les faits et les précautions prises par les demandeurs; que ladite requête allègue que l'intimité des demandeurs avec Wilson, pendant le litige, faisaient suspecter leur impartialité; qu'ils n'avaient pas rempli leur devoir, etc.; que les dites assertions et allégations sont fausses, malicieuses; sont un libelle. Ils concluent à ce que la Corporation soit condamnée à payer aux demandeurs \$20,000 de dommages. La défenderesse a plaidé une défence au fond en droit, par laquelle elle prétend que l'action ne peut être maintenue: 1° Parce que la défenderesse n'est pas, comme corporation municipale, et en la qualité dans laquelle elle est poursuivie, responsable de dommages envers les demandeurs, pour les raisons qu'ils allèguent; 2º Parce que la résolution du 7 août 1868, alléguée, et de laquelle est prétendu découler le droit d'action, était, de la part de la défenderesse, un acte de législation, et l'exercice d'une fonction judiciaire qu'elle avait, par la loi, autorité d'accomplir, et pour laquelle, en aucune manière, elle ne peut être passible de dommages. La défense en droit est appuyée sur le motif que les actes dont se plaignent les demandeurs étaient des actes comme corps légiférant. Tel n'est pas le cas. La Corporation ici n'agissait que comme corps administratif soutenant un litige. Elle voulait acquérir par voix d'expropriation. elle était en instance devant le pouvoir judiciaire; mécontente de la conduite de deux des commissaires nommés par le juge pour procéder à l'expropriation, elle demande leur destitution: je ne vois pas comment elle peut prétendre que c'est là légiférer. Quant à l'autre moyen des défendeurs, qu'en leur qualité de corporation municipale, ils ne peuvent être tenus responsables, en la manière portée en la déclaration, il n'est ras plus fondé. Je ne connais aucune disposition statutaire qui soustrait les corporations municipales aux règles qui régissent les corporations ordinaires en matières civiles. L'art 356 C. C., déclare que les corporations politiques sont sujettes

aux lois civ duels de la rations civil mêmes lois réunit les d tant qu'elle lois de polic ration civile tants, elle p dans la limi rapport, elle demandeurs deresse ren politiques of en cette qu comme tout autorisés à défenderesse propriation sitions de l pour faire l tents de la par la voie d lution attaqu les demande commissaires calomnieuse, les défendeu Supérieure u termes d'inti proprié, l'ho cution fidèle saires, et avi une somme e Wilson ; que les défendeu avaient caus jugement er suffisantes po et les défend départ en le offense dont prouvée, rien résulte. Que suite pour de jurisprudenc corporations

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aux lois civiles dans leurs rapports avec les membres individuels de la société, sous certains rapports, et que les corporations civiles, étant des personnes fictives sont soumises aux mêmes lois que les individus. La Corporation de Montréal réunit les deux qualités. Elle est corporation politique, en autant qu'elle a droit de faire et promulguer des règlements ou lois de police pour l'étendue de son territoire. Elle est corporation civile, en tant qu'administrant les intérêts de ses habitants, elle peut acquérir des biens et faire tout autre contrat dans la limite des pouvoirs qui lui sont attribués, et, sous ce rapport, elle est soumise au droit commun. La déclaration des demandeurs n'allègue que des faits de la part de la défenderesse rentrant dans la catégorie des actes civils et non politiques ou législatifs. Dans ses relations avec les individus, en cette qualité de corporation civile, elle est responsable comme tout autre individu, pour les actes de ceux qui sont autorisés à la représenter. Les demandeurs allèguent que la défenderesse voulant acquérir certain terrain, per voie d'expropriation forcée, les demandeurs furent, suivant les dispositions de la loi en pareil cas, choisis comme commissaires pour faire l'évaluation du terrais en question, et que mécontents de la manière que les demandeurs procédaient, elle a, par la voie du conseil de ville, la représentant, passé une résolution attaquant le caractère des demandeurs et déclarant que les demandeurs avaient forfait à leurs obligations comme tels commissaires, laquelle résolution, disent les demandeurs, était calomnieuse, un libelle et une injure à leur réputation; que les défendeurs ont ensuite présenté à l'un des juges de la Cour Supérieure une requête exposant, entr'autres choses, que les termes d'intimité qui existaient entre les demandeurs et l'exproprié, l'hon. C. Wilson, étaient incompatibles avec l'exécution fidèle et impartiale de leurs devoirs comme commissaires, et avait de fait influencé les demandeurs à évaluer à une somme exhorbitante l'indemnité payable au dit hon. Chs. Wilson; que toutes ces insinuations et accusations portées par les défendeurs contre les demandeurs étaient fausses, et leur avaient causé des dommages considérables, et ils demandent jugement en conséquence. Semblables allégations seraient suffisantes pour établir un droit d'action contre un particulier, et les défendeurs n'ont cité aucune autorité pour justifier un départ en leur faveur de la règle ordinaire. Il y a ici une offense dont les défendeurs doivent rendre raison et si elle est prouvée, rien ne peut les soustraire à la response bilité qui en résulte. Que les corporations ne soient pas passibles de poursuite pour délits, est une prétention qui est contredite par la jurisprudence. Ne voit on pas même mettre en accusation les corporations municipales, pour négligence de leurs devoirs. Grant, pp. 168, 284, aussi p. 164. A la page 281, Grant nous donne comme règle que la corporation n'est pas responsable d'actes ayant couleur d'actes corporatifs, lorsque ces actes ne sont pas de sa compétence, auquel cas on ne doit s'adresser qu'a ceux qui ont fait l'acte. Tel n'est pas le cas ici. La Corporation de Montréal était réellement partie litigante sur l'expropriation demandée, et le Conseil-de-ville, qui la représentait, de même que la Corporation, avait droit d'adopter ou faire adopter tout acte judiciaire, pour sauvegarder les droits de la Corporation. Voir The Philadelphia, Washington & Baltimore R. R. Co., & Patrick Quigly—Howard's Rep. vol. 21, p. 202. Secus Stevens vs Middland Counties R. Co. & Lander—10 Exe. Rep. 352, Hurlston & Gordon, semble peu applicable néanmoins."

Le jugement de la cour est comme suit: "The Court, considering that the grounds of the demurrer are insufficient, and that plaintiffs' allegations in their declaration are sufficient to support the conclusions thereof, doth dismiss the said demurrer, with costs." (17 J., p. 46; 3 R. L., 451; 4 R. L., p. 7; 1 R. C., p. 475.)

BARNARD, avocat des demandeurs. ROUER ROY & DEVLIN, avocats des défendeurs.

EXAMINATION OF WITNESSES.

SUPERIOR COURT, Montreal, 3rd December, 1872.

ENQUETE SITTINGS.

Coram TORRANCE, J.

COURTNEY vs Bowie es-qual.

Held:—That a witness cannot be contradicted as to collateral matters.

The action was on a note which defendants averred had been stolen. A witness, Henry Bowie, was examined for plaintiff, and stated, in cross-examination, that a charge of perjury, which had been brought against him, fell to the ground. The defendants, in rebuttal, offered to prove against the credibility of Henry Bowie, that the statement that the charge of perjury fell to the ground was untrue. The presiding Judge held that the witness could not be contradicted as to a collateral matter. The following authorities were referred to: Best, Evidence, pp. 799, 800, 4th edn.; Queen vs Holmes,

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In re Lusk

Held:—10.

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Held:—That portant eviden and the attorn sequences by

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& Furness, 1 Law Rep., Crown Cases Reserved, 334; 1 Greenleaf, on Evidence, § 449; Harris vs Tippet, 4 Camp. 637; 2 Taylor, Ev. § 1324, 5th edn. (17 J., p. 47.)
Keller, for plaintiff.

Kelly, for defendant.

PARTNERSHIP.—ASSIGNMENT.

SUPERIOR COURT, Montreal, 19th November, 1872.

IN INSOLVENCY.

Coram Torrance, J.

In re Lusk et al., Insolvents, and WILLIAM FOOTE, Petitioner.

Held:—10. That an order, for the examination of witnesses in insolvency, made on the day of the voluntary assignment, under the Insolvent Act of 1869, of a partnership estate, by two out of three partners of whom the firm consisted, is irregular.

20. That the petition for such examination should set forth satisfactory reasons for the order. (32 and 33 Vic., cap. 16, ss. 110, 112.)

Scandiles—Two partners of a partnership of three are without power to

Smaller-Two partners of a partnership of three are without power to make a voluntary assignment of the partnership to an interim assignee. (17 J., p. 47; 19 J., p. 104.)

J. A. PERKINS, for petitioner.

REQUETE CIVILE.

SUPERIOR COURT, Montreal, 30th November, 1874.

Coram JOHNSON, J.

In the matter of Lusk et al., insolvents, petitioners for discharge, and RIDDELL, assignee, and Ross, creditor, contestants.

Held:—That where a party has been precluded from adducing important evidence, owing to a misunderstanding between his attorneys and the attorney on the opposite side, he may be relieved from the consequences by a requête civile.

PER CURIAM:—There were two insolvents, and they made their applications to have their certificates confirmed separately, and each was contested by two separate parties: 1st, the assignee of their estate; and 2nd, by Ross and others, so that there were four contestations in all. They were heard before me at enquête and merits on the 10th of June last, and one

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ted as ferred olmes, hearing applied to all the four cases. When they were called, the petitioners were not ready to proceed, and an informal application was made to put off the cases on grounds that were then inadmissible—being the same as those now urged by requête civile, but not supported by affidavit at that time, and the contesting parties therefore had it all their own way. In this state of matters the Court had no alternative but to maintain the contestations, and dismiss the petitions for confirmation, which was done by the judgment of the 30th of June. The grounds of that judgment were the failure of the petitioners to prove the allegations of their petition for discharge, and also the sufficiency of the proof made by the contestants under the circumstances which had taken place at the hearing. The petitioners now present a demand in revocation of these judgments, and the gist of their application in each of these cases is the same. They urge that the insolvents were precluded, by a misunderstanding between their attorneys and the attorneys of the parties contesting their certificate, from producing important evidence to show that they were intitled to a confirmation of their discharge, as well on the grounds set forth in their petition, as by reason of the refutation they could have given of the pretentions of the contestants, if they had not been, as they say they were, taken by surprise and misled. It is extremely disagreable to a court of justice to witness misunderstandings between professional men in the cases before it, and still more so to have those misunderstandings made the subject of complaint on either side for redress. I should be inclined to say in all such cases, the misunderstanding must, in order to be a ground of complaint, be one not arising from the neglect of the attorney complaining, as in that case the remedy of the party would be an action against his attorney. In the present case the evidence shows that the party may have been exposed to the most serious consequences, not on account of any negligence of his attorney, but in consequence of the reliance of the latter upon an understanding with his adversary, who, in the pressure of business, forgot or disregarded it. The party ought not to be made to suffer for this. He has no redress if he cannot bring the matter up by requête civile, as it is obvious that neither revision nor appeal could be adequate to correct what does not appear by record. These petitions will therefore be granted, each party to pay his own costs, as well those of the first judgment, as of the requete civile, each being equally wrong. Requete civile allowed. (19 J., p. 104.)

MONK & BUTLER, for insolvents.

J. A. PERRINS, for contestants.

Ex-Parte I

Jugé :—Qu sance dans le ordonner que par un arpen

Le 24 se devant la c d'un acte d Laurent, d pondant, le erronément les registre la paroisse ministrate mulgré les ainsi du pe dans la néc 4 juin 1870 de rectifier sa requête, soumis aux Le requéra l'entrée au: parties into gistres. Le rieure renc " cour atte " limites of " conscript " etc " Att de territoir avant d'ac description des Vertus de St-Laur vu que le d

(1) Code C arrêt du cons

REGISTRES DE L'ETAT CIVIL.

COUR SUPÉRIEURE, Montréal, 30 janvier 1872.

Coram BERTHELOT, J.

Ex-Parte Dévoyau dit Laframboise, Requérant, et Le révérend père Félix Vénard, Intimé.

Jugé:—Que sur une requête pour la rectification d'un acte de naissance dans les registres d'une paroi-se, l' Cour, avant faire droit, pout ordonner que la délimitation de cette paroisse soit constatée et établie par un arpenteur, suivant son érection civile. (1)

Le 24 septembre 1870, le requérant présenta une requête, devant la cour Supérieure, à Montréal, pour la rectification d'un acte de naissance, dans les registres de la paroisse de St-Laurent, dans le district de Montréal, se plaignant que le répondant, le curé de la paroisse de St-Laurent, avait désigné erronément, dans l'acte de naissance qu'il avait rédigé, dans les registres de sa paroisse, le requérant comme paroissien de la paroisse de Lachine, d'après un décret canonique de l'administrateur du diocèse de Montréal, en date du 12 mai 1870, malgré les protestations du requérant, et qu'il en avait fait ainsi du parrein et de la marraine, et que partant, ils ont été dans la nécessité de refuser de signer l'acte de naissance. Le 4 juin 1870, le requérant a notifié le curé, par un acte notarié, de rectifier cette erreur. Le requérant alléguait encore, dans sa requête, que ce décret canonique est nul, qu'il n'a jamais été soumis aux commissaires civils, ni ratifié et confirmé par eux. Le requérant concluait à ce que le curé fût tenu de faire l'entrée aux registres de la paroisse, du domicile véritable des parties intéres-ées, et concluait à la rectification de ces registres. Le répondant contesta cette requête. La cour Supérieure rendit un jugement interlecutoire, comme suit : "La "cour attendu que, par la loi, ou l'édit de 1722, fixant les "limites des paroisses de St-Luccent, de Lachine, et la cir-" conscription des dites deux paroisses, est donné comme suit, " etc " Attendu qu'il est opportun de constater la continuité de territoire de la circonscription de chacune le ces paroisses avant d'adjuger. Attendu qu'il résulte des désignations et descriptions ci-dessus qu'une partie de la Côte de Notre-Dame des Vertus, est comprise dans la circonscription de la paroisse de St-Laurent, tandis que l'autre l'est dans celle de Lachine, vu que le décret canonique du 12 mai 1870, n'a pas encore été

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⁽¹⁾ Code Civil, art. 75 à 78 ; Edits et Ord. ; 1 vol. Ed. de 1803, p. 403, arrêt du conseil d'Etat du 3 mars 1722.

reconnu par aucune proclamation de l'autorité civile, la cour avant faire droit, ordonne que par H. Maurice Perrault, arpenteur de la cité de Montréal, il soit procédé à faire un plan des dites deux côtes de Notre-Dame des Vertus et de Liesse, et indiquant la situation de la terre ou immeuble occupée par le requérant, et de constater, s'il lui est possible, qu'était l'etendu des dites deux côtes en 1722, et des terres alors concédées en icelle, et aussi la limite dans la dite Côte de Notre-Dame des Vertus séparant les dites deux paroisses des St-Laurent et de Lachine. Lequel arpenteur procédera, après serment prêté, à entendre les parties dûment notifiées, et à faire, sur le tout, son rapport à cette cour, le ou avant le 17 mai prochain, ou plus tôt, si faire se peut, dépens réservés. (17 J., p. 49.)

D. D. BONDY, avocat du demandeur.

R. LAFLAMME, Q. C., avocat du défendeur.

EVOCATION.

SUPERIOR COURT, Montreal, 20th November, 1872.

Coram MACKAY, J,

DE BEAUJEU & vir vs MCNAMEE.

Held:—In a non-appealable cause returnable out of term, that a defendant may evoke at any time before plaintiff has obtained an acte of foreclosur—(Art. 1130 C. de P. de 1897.)

The printiffs, on the 12th September, 1872, instituted an action of damages for \$90, against defendant, for alleged quarrying vithout their consent, on the Isle d'Assigny, also alleged to be their property. The action was returned on the 30th September. The defendant, on the 9th of October, fyled a declaration in writing, that he evoked the case, the land belonging to the Crown, and not to plaintiffs. He said he intended to quarry there in the future.

DOUTRE, Q. C., for defendant, cited C. C. P. 1058, and applied to the Court to decide summarily whether the evocation was well founded.

BONDY, for plaintiffs, said that defendant had been foreclosed from pleading, and could not evoke after foreclosure.

DOUTRE, in reply. It is true that the five days for pleading had expired, but plaintiffs had taken no proceedings since.

PER CURI sure require tion of the e p. 50.)

Bondy, for Doutre,

C. BRUNET I

Jugé:—Que, et Experts, etc eux par la par Cour, sur requ ticiens et Exp

Les parties succession, a opérer à la l duisit, deva 1862. Les d'entre eux pour contest cour, qui a couit: "La cou maire des "que le défe" nommés er

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" testé par ! " et forgé, e " Brunet dit " des pratic

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" ledit reçu,

PER CURIAM: The plaintiffs have not obtained the foreclosure required by C. C. P. 1099, and, meanwhile, the application of the defendant is in time. Evocation allowed. (17 J., p. 50.)

BONDY, for plaintiffs.

DOUTRE, Q. C., for defendant.

PAUX .- PREUVE.

Cour Supérieure, Montréal, 30 décembre 1871.

Coram BEAUDRY, J.

C. Brunet dit Letang et al., vs E. Brunet dit Letang.

Jugé:—Que, dans le cas où une partie se plaint, devant des Praticiens et Experts, etc., lors de leur opération, qu'un document produit devant eux par la partie adverse est faux; elle a droit de contester devant la Cour, sur requête sommaire, ce document, ainsi que le rapport des Praticiens et Experts, en autant qu'il concerne tel document.

Les parties en cette cause, sur une demande en partage de succession, ayant été renvoyés devant des praticiens, pour opérer à la liquidation de cette succession; le défendeur produisit, devant les praticiens, un reçu daté du 9 septembre 1862. Les demandeurs contestèrent la sincérité de ce document alors produit devant les praticiens que la majorité d'entre eux adopta. Les demandeurs firert motion, en cour, pour contester ce document, et le rapport. Le jugement de la cour, qui a donné gain de cause aux demandeurs, est comme suit: "La cour, ayant entendu les parties, sur la requête som-" maire des demandeurs, du 20 décembre courant, qu'attendu " que le défendeur a produit, devant les praticiens et experts nommés en cette cause, lors de leur opération, un document qu'il a prétendu être un reçu que lui aurait donné son père, fru Eustache Brunet dit Letang, en date du 9 septembre 1862, d'une somme de 11500 livres, ancien cours, en déduction du prix de la vente d'une propriété qu'il lui aurait consentie, le 9 septembre 1851, que ce reçu a été contesté par les demandeurs, qui ont prétendu qu'il était faux et forgé, et n'avait jamais été écrit et signé par Eustache "Brunet dit Letang, leur père, et que, néanmoins, la majorité des praticiens et experts a cru devoir admettre ledit reçu, " et de donner crédit d'autant au défendeur, il soit donné acte aux demandeurs de ce qu'ils contestent ledit reça, et le rapport même des praticiens et experts, en autant qu'il concerne ledit reçu, et que les intérêts des parts en sont affectés, et ce

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"qu'ils contestent ledit reçu, et le rapport même des prati-"ciens et experts concernant icelui, permet aux demandeurs

" de produire les moyens de contestation à cet effet, et il est " ordonné et enjoint au défendeur de répondre à ladite con-

" testation dans les délais ordinaires, pour ensuite être pro-" cédé ainsi que de droit." (17 J., p. 51.)

DORION, DORION & GEOFFRION, avocats des demandeurs.

CARTIER, POMINVILLE & BETOURNAY, avocats du défendeur,

PAUX.-PREUVE.

COUR SUPÉRIEURE, Montréal, 29 novembre 1873.

Coram MACKAY, J.

BRUNET vs BRUNET.

Jugé:—Que, quoi qu'il y ait une forte preuve qu'un reçu produit par un défendeur est forgé, ce reçu sera cependant maintenu, si aucun affidavit n'est produit pour le nier.

This suit being sent to three notaries, as practicians, a receipt for 11,000 livres, old currency, is produced by defendant. An enquête takes place on the contestation of the report. There is strong evidence to prove the receipt a forgery, but there is conflict of proof, and no affidavit denying it, and the receipt must stand, and the action be dismissed. (5 R. L., p. 466.)

DORION, DORION & GEOFFRION, for plaintiff.

SOCIETE. - ENREGISTREMENT.

DISTRICT DE ST. HYACINTHE, 25 novembre 1872.

Coram SICOTTE, J.

PIERRE L. LAROSE, demandeur, et THOMAS PATTON, défendeur.

Jugé:—10 Qu'un contrat fait par deux personnes, par lequel elles s'obligent de fournir, à une compagnie de chemin de fer, une certaine quantité de ties ou liens pour un prix convenu de tant par mille ties, constitue entre elles une société commerciale, dans le seus du C. 65, S. R. B. C., et de l'article 1834 C. C., requérant l'enregistrement d'une déclaration de société aux endroits indiqués par la loi:

20 Qu'une de formation que protonotaire blissements de gistrement de isolés de com

Les faits Patton, et fait, conjoir pour lui fou le long de a depuis Mon puis Montre trat, le défe divers conti de ties à d Tronc, et, Bagot, distr la formation été enregist Bagot, non St. Hyacin d'affaires de les sous-con prix a été d'ailleurs, at de commerc gistrer qu'à cinthe, où e et que la pre registrement être renvoy société n'aye le contrat fournir des merciale doi écrit, en ve preuve a co d'affaires et relatives au Montréal ; paiement a contracteurs district de S " La Cour

"La Cour, Shannon, av était égalem 20 Qu'une telle société n'est tenue d'enregistrer une déclaration de sa formation qu'un bureau d'enregistrement des comtés, et au bureau du protonotaire des districts où elle a des bureaux d'affaires et des établissements de commerce, et qu'elle n'est pas obligée de faire cet enregistrement dans les comtés ou districts où elle ne fait que des actes isolés de commerce.

Les faits de la cause sont les suivants: Le défendeur, Patton, et un nommé Shannon, domiciliés à Montréal, ont fait, conjointement, un contrat avec la Cie du Grand Tronc, pour lui fournir, dans un délai spécifié, 100,000 ties, livrables le long de sa voie ferrée, depuis Montréal jusqu'à Kingston, depuis Montréal, jusqu'à la Rivière-du-Loup, (en bas), et depuis Montréal jusqu'à Island Pond. En exécution de leur contrat, le défendeur et Shannon ont donné des sous-contrats à divers contracteurs, qui ont livré une assez grande quantité de ties à différents endroits, le long de la ligne du Grand Tronc, et, spécialement, à St. Ephrem d'Upton, comté de Bagot, district de St. Hyacinthe. Une déclaration constatant la formation de leur société, pour les fins susdites, n'a jamais été enregistrée dans le bureau d'enregistrement du comté de Bagot, non plus qu'au bureau du protonotaire du district de St. Hyacinthe. Le défendeur plaide que le seul bureau d'affaires de cette société a toujours été à Montréal, où tous les sous-contrats ont été donnés, faits et signés, et où leur prix a été payé; que la prétendue société n'a jamais eu, d'ailleurs, aucun bureau d'affaires, ni maison ou établissement de commerce, et, qu'en conséquence, elle n'était tenue d'enregistrer qu'à Montréal, et nullement à Bagot et à St. Hyacinthe, où elle n'a fait que des actes isolés de commerce; et que la présente action, réclamant la pénalité, à défaut d'enregistrement à Bagot et à St. Hyacinthe, doit, en conséquence être renvoyée. Le défendeur plaide, en outre, que cette société n'ayant été formée que pour les fins mentionnées dans le contrat fait avec la Cie du Grand Tronc, savoir, pour fournir des ties à cette dernière, n'est pas une société commerciale dont il est requis d'enregistrer une déclaration, par écrit, en vertu du c. 65, S. R. B. C., et de l'art. 1834 C. C. La preuve a constaté que cette société n'avait qu'un bureau d'affaires et établissement commercial, où toutes les affaires relatives au dit contrat étaient traitées, savoir, en la cité de Montréal; mais elle constate aussi que des ties, dont le paiement a été fait à Montréal, ont été délivrées par des sous contracteurs, le long de la voie ferrée, à St. Ephrem d'Upton, district de St. Hyacinthe.

"La Cour, considérant que la société, entre le défendeur et Shannon, avait un bureau et siège d'affaires à Montréal, où était également le domicile des parties; considérant que, pour

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rel elles rertaine ille ties, u C. 65, t d'une les fins de leur entreprise de fourniture de bois avec la Cie du Grand Trone, ils n'ont fan, à Upton, comté de Bagot, que quelques achats de bois, par un de leurs employés, sans y avoir jamais tenu bureau ou établissement; considérant que la société faisait ses affaires à Montréal, et, n'a pas fait d'affaires dans le comté de Bagot, dans le sens prévu et indiqué dans le C. 65 des S. R. B. C., et, partant, qu'il n'y avait pas obligation de donner publicité à cette société, par l'enregistrement et dépôt, chez le protonotaire de la C. S. du district de St. Hyacinthe, et chez le régistrateur du comté de Bagot, d'une déclaration par écrit, tel que prescrit par cet acte; considérant que le défendeur n'a pas encouru la pénalité pour laquelle il est poursuivi, et que le demandeur n'a pas droit de la réclamer comme il l'a fait par son action, le déboute d'icelle avec dépens." (4 R. L., p. 369 et 17 J., p. 52.)

R. E. FONTAINE, pour le démandeur. CHAGNON et SICOTTE, pour le défendeur.

REVISION DEVANT TROIS JUGES.

COUR SUPÉRIEURE, EN RÉVISION,

Montréal, 21 décembre 1872.

Coram Mackay, J., Torrance, J., Beaudry, J.

McLaren, Requérant, et La Corporation du Township de Buckingham, Intimé.

Jugé:—1° Qu'une inscription pour Révision, par la Cour Supérieure, est suffisante, et qu'il n'est pas nécessaire de dire "par trois juges de la Cour Supérieure."

2º Qu'un jugement rendu par la Cour de Circuit, sous les dispositions du Code Municipal, art. 698 et suivants, est sujet à appel, et oue, par conséquent, il y a lieu à la Révision.

3º Que, dans ce cas, un dépôt de \$20 est suffisant.

Le requérant demandait, et avait obtenu, devant la Cour de Circuit, la cassation d'un Rôle d'Evaluation d'une municipalité locale. L'intimé a inscrit la cause, pour Révision de ce jugement, par la Cour Supérieure, à Montréal, et n'a accompagné cette inscription, que d'un dépôt de \$20.00. Le requérant fit alors motion pour rejeter l'inscription, pour les raisons suivantes: 1° parce que la Cour Supérieure n'avait pas de juridiction pour reviser les jugements des autres Cours; 2° que cette cause n'était pas, de sa nature, une cause appelable; 3° parce que le dépôt de \$20 était insuffisant, le

rôle faisant coup \$400.0 raisons. (17 McLEOD, BURROUGE

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RAPIN V8 MC

Jugé:—Que Civil, la préso incendie arrive taire, à moins d

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to the cause TOME X rôle faisant voir que le montant en litige excédaient de beaucoup \$400.00. La Cour a renvoyé la motion, sur les trois raisons. (17 J., p. 53)

McLeod, pour le requérant. Burroughs, pour l'intimé.

LOUAGE.

COUR SUPÉRIEURE, EN RÉVISION, Montréal, 30 mars 1872.

Coram Mondelet, J., Mackay, J., Beaudry, J.

RAPIN vs McKinnon.

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Jugé:—Que conformément aux dispositions de l'article 1629 du Code Civil, la présomption légale doit disposer la Cour à déclarer qu'un meendie arrivé dans les lieux loués à été causé par la faute du locataire, à moins qu'il ne prouve le contraire.

Par bail du 8 février 1864, le demandeur a pris à bail, du défendeur, une maison, sise rue St Joseph, à Montréal, avec la cour en arrière, et les bâtisses érigées dans cette cour, et le passage en commun, et ce pour y tenir un hôtel. Pendant l'existence de ce bail, le demandeur a pris à bail un terrain adjoignant, et il y a érigé quelques remises, et y a fait une e minunication avec le terrain et bâtisses ainsi par lui érigées. Vers le 25 septembre 1868, une remise en arrière de l'hôtel, et les écuries adjoignant le terrain que le demandeur avait loué du voisin, furent en partie détruites par un incendie, et le demandeur se trouvait à être privé de 14 ou 15 places d'écuries, et d'une partie de la remise, et il les a luimême fait réparer. Le demandeur porta son action en justice, contre le défendeur, son bailleur, sur l'allégation que cet incendie n'avait pas eu lieu par sa faute, mais était dû au fait d'un incendiaire, et il a réclamé une déduction sur le loyer payé, depuis l'époque de l'incendie, à venir à la date de son action, tant comme quantum meruit, qu'à titre de dommages et intérêts, savoir, \$48.56. Le défendeur a contesté cette action, sur le principe que, par les faits ci-dessus exposés, le demandeur avait mis les lieux loués plus en danger d'incendie, que lorsqu'ils lui avait été loués par le défendeur. La Cour de Circuit, pour le district de Montréal, le 30 juin 1871 (Torrance, J.), a débouté le demandeur de son action, et ce jugement est comme suit: "The Court, considering that the fire, on account of which plaintiff claims a reduction of rent occurred in the premises in the occupation of plaintiff, and there is, in law, a presumption of negligence on his part, as to the cause of said fire, which presumption has not been TOME XXIII.

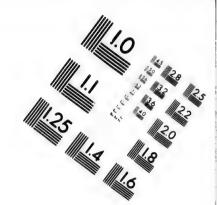
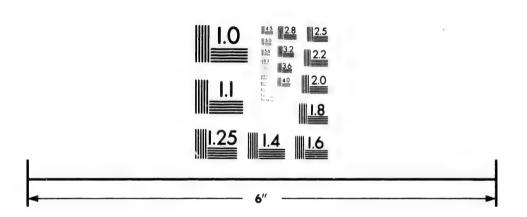


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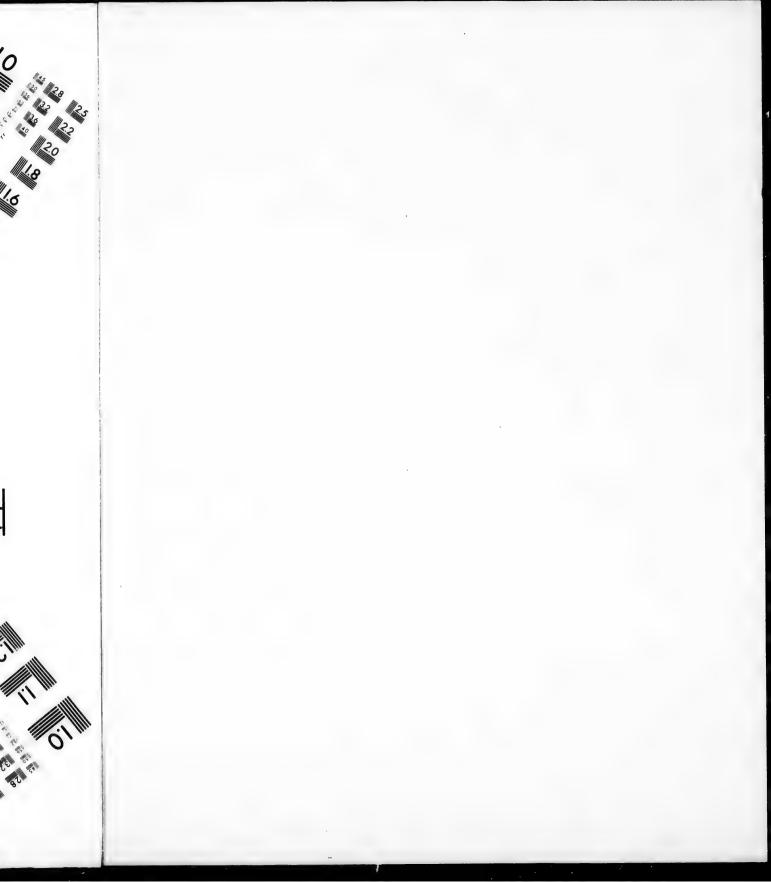


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"rebutted by the evidence of record; considering further, "that plaintiff paid to defendant, without reserve, the rent, "portion of which he seeks to recover back by the present "action, and, in the circumstances of this cause, the demande "of plaintiff is unfounded, in law and in fact; doth dismiss "plaintiff's action and demande, with costs." Ce jugement de la Cour de Circuit fut porté en Révision, à Montréal, par le demandeur.

MACKAY, J.: The original plaintiff, Rapin, was now the plaintiff in revision. The suit was instituted in the Circuit Court, but was evoked. The declaration alleged a lease, from plaintiff to defendant, of a hotel, at an annual rent of £150. The lease, of date 6th March, 1868, was for five years, from 1st May, 1868. The premises consisted of a hotel, brick stable and other buildings, and the declaration set up that all these were required by Rapin, for his business; that a fire happened through no fault of the plaintiff, but by the act of an incendiary; that the injury so caused, defendant would never repair; that plaintiff caused an expertise to be made, in which defendant refused to join, and that the damage was estimated to diminish the annual velue of the buildings, to an extent equal to one-ninth of the sent, and plaintiff sought to recover back this amount. The plea set up that, if the fire happened, it was from want of proper care by plaintiff. The act of incendiarism could not exonerate plaintiff, for it was his duty to keep a watch. Upon the pleadings and the evidence, judgment went dismissing Rapin's action, on the ground, first, that he had not removed, by proof, the presumption of negligence; and, secondly, that plaintiff had always paid his rent. since the fire, a portion of which rent he now sought to recover back. His honor cited art. 1629 of the Civil Code: "When loss by fire occurs in the premises leased, there is a "legal presumption in favor of the lessor, that it was caused " by the fault of the lessee or of the persons for whom he is "responsible; and unless he proves the contrary he is "answerable to the lessor for such loss." The evidence was far from showing no negligence on the part of plaintiff. At the time of the fire there was an exhibition of poultry, in his premises, and Rapin should have been looking after the safety of his stables where three valuable horses had been destroyed. Who the incendiary was had not been discovered. The question, in the Court below, was this: Had Rapin shown himself to be without fault? The Court below thought he had not, and the majority of this Court saw no reason to disturb that judgment. Judgment confirmed. (17 J., p. 54)

M. le juge Mondelet ne concourant pas dans ce jugement Leblanc, Cassidy & Lacoste, avocats du demandeur.

DAY & DAY, avocats du défendeur.

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COUR DE CIRCUIT, Montréal, 2 mars 1871.

Coram Berthelot, J.

MARC TRUDEL, Demandeur vs Joseph Desautels, Défendeur, et Médéric Content et al., Tiers-saisis, et François David et al., Intervenants et Ledit Marc Trudel, Contestant, et Hubert, Papineau & Honey, mis en cause.

Jugé:—Que l'article 551 du Code de Procédure Civile, s'applique à tout jugement interlocutoire, comme aux jugements finals.

Qu'exécution d'un jugement interlocutoire portant condamnation au paiement des frais du jour, peut émaner après quinze jours de sa date, même avant la reddition du jugement final.

Que le Protonotaire peut être sur motion pour règle nisi, contraint à délivrer telle exécution.

Le 2 février 1871, la Cour de Circuit a rendu un jugement interlocutoire, condamnant les intervenants à payer au demandeur les frais encourus par eux ce dit jour, à défaut par eux de procéder.

Plus de quinze jours après la date du jugement interlocutoire, mais avant la reddition du jugement final, le demandeur requit une exécution pour le paiement desdits frais. Sur refus du protonotaire de délivrer telle exécution, parce que le jugement final n'était pas rendu, le demandeur fit motion pour émission d'une règle nisi, contre le protonotaire, pour l'obliger à délivrer telle exécution. Il produit, à l'appui de sa motion, un affidavit de son avocat, constatant les faits, un mémoire de frais du jour, 2 février, et une copie du jugement interlocutoire. Il cita les articles 545 et 551 du C. P. C.; la cause des Dames Dambourgès, contre la succession Boucher, où furent émanés un grand nombre d'exécutions, pour le paiement des jugements interlocutoires, et la cause Duhaut vs Lacombe, 19 R. J. R. Q., pp. 529, 575; nº 6410, Orms vs Kemp, et White, T.-S. (TORRANCE, J.); n° 2076, Kingan vs Kemp, (30 déc. 1870). Motion accordée. (4 R. L., p.701; 17 J., p. 56)

Brunet & Bertrand, avocats du demandeur.

ACTION EN SEPARATION DE CORPS.-EVIDENCE.

SUPERIOR COURT, Montreal, 30th December, 1871.

Coram TORRANCE, J.

STARKE vs MASSEY.

Held:—That, in a case en séparation de corps et de biens, the contents of a letter alleged to have been written by defendant, and the destruction of which has been sworn to, may be established by parol evidence.

PER CURIAM: This is a motion to revise the ruling at enquête of Mr Justice Berthelot. The action is one en séparation de corps et de biens, and certain questions were put to plaintiff's mother examined as a witness on the part of plaintiff, tending to prove the contents of a letter said to be written by defendant, and which has been destroyed. I assume, as a matter of fact, that the letter has been destroyed, and, applying, therefore, the rule of law in such a case, I must hold that the questions ought to be answered. My brother Judge maintained the objections which were made to these questions, on the ground that parol evidence could not be adduced, under the circumstances. As I think otherwise, I must set aside his ruling, and grant the plaintiff's motion. Motion to revise ruling at enquête granted. (17 J., pp. 56, 242)

A. & W. ROBERTSON, for plaintiff. DEVLIN & POWER, for defendant.

ACTION EN SEPARATION DE CORPS.—EVIDENCE.

Superior Court, Montreal, 31th January, 1873.

Coram Johnson, J.

STARKE vs MASSEY.

Held:—That in an action en séparation de corps et de biens for adultery by the husband in the common househould of himself and his wife, the admissions of the husband, made by him to third persons or resulting from his default to answer interrogatories sur faits et articles will be considered by the Court, where the Court is of opinion that they are not the result of collusion between the plaintiff and the defendant.

This was an action by a wife, en séparation de corps et de biens, predicated on the alleged adultery of the husband, in their common household. At the final hearing, plaintiff moved a had bee fessis in the sam them.

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ps et de band, in plaintiff moved that certain interrogatories sur faits et articles which had been duly served on defendant should be taken pro confessis in consequence of the default of defendant to answer the same, and defendant, on the other hand, moved to reject them.

"The Court having heard the parties, upon the motion of defendant, praying that the interrogatories sur faits et articles served upon him be rejected as on the motion of plaintiff, that said interrogatories be taken pro confessis and also upon another motion of plaintiff that Rulings at Enquête be revised and set aside, and on the merits; pronouncing, first, upon the motion of defendant doth dismiss and overrule said motion; secondly, as to the motion by plaintiff to have the interrogatories taken pro confessis, doth grant said motion; and thirdly, upon the motion by plaintiff for revision of Rulings at Enquête, it is ordered that plaintiff do take nothing by said motion. And the Court, adjudging upon the merits; considering that admissions by defendant, whether made by him to third persons, or resulting as a consequence of law, from his default to answer interrogatories sur faits et articles, can, by law be made, and are to be considered and applied by the Court, in the present case, subject to the rules and principles of law in that behalf, and that wherever it appears to the Court that such admissions are not the result of collusion between the defendant and the plaintiff the facts so admitted, may be taken and held as proved, where they concur with facts otherwise proved by legal evidence; considering, further, that plaintiff has proved the material allegations of her declaration, as well by the admissions and confessions of the defendant, in so far as these can go to prove the said allegations, as by other evidence independent of said admissions, and that the fact of adultery committed by defendant with one Bridget Doolan, in the common household of the defendant and his wife, the present plaintiff at Ottawa, is established to the satisfaction of the Court; and, considering, therefore, that the allegations of the plaintiff are sufficiently prove 1; Doth order and adjudge that plaintiff be and remain from this day henceforth separated as to body séparée de corps, from the defendant her husband, hereby enjoining defendant not to trouble plaintiff or live with her, sous toutes peines que de droit, nor to molest or interfere with the child, issue of the marriage of said parties, the Court hereby maintaining plaintiff in the possession, custody and care of said child, to the exclusion of defendant. (17 J., p. 242.)

A. & W. ROBERTSON, for plaintiff. DEVLIN & POWER, for defendant.

BONDS TO THE QUEEN. -- HYPOTHECS.

SUPERIOR COURT, Montreal, 30th November, 1872.

Coram TORRANCE, J.

THE TRUST AND LOAN COMPANY OF UPPER CANADA vs MONK ès qual., and divers opposants, and Gédéon Ouimet, Attorney General pro Regina, opposant collocated, and G. H. Monk, contestant of collocation.

Held:—1° That a bond for a sum of money, in favor of the Queen, of date 1845, duly registered, gave a hypothèque on the property present and future of her debtors.

2º That the Attorney General for Lower Canada could prosecute the payment of such bonds made to secure obligations incurred in Lower

Canada.

TORRANCE, J.: This case comes before the Court, on the merits of a collocation made by the prothonotary in favour of the Attorney General pro Regina, for \$6002.09. The opposition of the Attorney General set forth the appointment of Monk, Coffin and Papineau, as prothonotary of the court of Queen's Bench, district of Montreal, on the 5th July, 1844; that they held that office till May, 1850, from which time they were prothonotary of the Superior Court, at Montreal. by statute; that they were appointed clerk of the Circuit Court, on the 24th December, 1849; that they fulfilled these duties till 12th March, 1865; that, as prothonotary of the Superior Court, they received \$2959.73, under 12 Vic., c. 112. and, as clerk of the Circuit Court, \$1215.96, under the same statute; that, as prothonotary of the Superior Court, from 10th Sept., 1850, to 12th March, 1865, they received \$1751.09. and, as clerk of the Circuit Court, during the same period. they received \$57.38, under 13 and 14 Vic., c. 37, making \$5984.16 in all; that Samuel Wentworth Monk, one of the said prothonotaries, died on the 12th March, 1865; that the property sold in this cause had been, long before his nomination as prothonotary, and had been since his property and liable for his debts and for the debts of the prothonotary to Her Majesty. The opposant, therefore, prayed that Her Majesty might be paid out of the proceeds of said property \$5984.16, &c. By a supplementary moyen, fyled 5th Oct., 1867, opposent set forth a bond by Monk, Coffin and Papineau, of date 26th September, 1844, for £2000, registered in the registry office for Montreal, on 7th March, 1845. By item 8 of the report of distribution, Her Majesty was collocated as follows: "To our Sovereign Lady, the Queen, under her privilege,

and under William (man, and £2000, fo Monk, Cof thonotary for money and Papine Gédéon Ou to prothon Henry Moi testation, t on 3rd Sep Her Majest did not owe 26th Sept., of Her Maj Henry Mon that now co the bond w "8 of the ju " in withho " tioned in " and is unf " the worst to be disa "awarded t " the judgm Her Majesty the Province Conclusions, that, by the hypothèque. " Now the co worth Mor " Joseph Am " selves, in " office of jo " Court of Q " truly pay o " such joint p "every the " the same, th " shall be voic Attorney Gen by 30 Vic., c. apply to the and en, of esent te the Lower 1 the our of oppo- ${f ent}$ of urt of 1844: 1 time ntreal, ircuit these of the c. 112. same , from 51.09. period. aking of the e pronation liable er Manjesty 16, &c. pos int e 26th z office report Hows:

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and under the bond entered into by Samuel Wentworth Monk. William C. H. Coffin, Louis J. A. Papineau, John Pangman, and Samuel Cornwallis Monk, for the penal sum of £2000, for security of the due and faithful fulfilment by Monk, Coffin and Papineau, of the duties of the office of prothonotary of the Superior Court, amount due Her Majesty for moneys received in and for her behalf, by Monk, Coffin and Papineau, as set forth in the opposition of the Honorable Gédéon Ouimet, \$5984.16; Costs of opposition, \$15.93; Fee to prothonotary, \$2.00, total, \$6002.09. The contestant, George Henry Monk, contested the collocation, alleging, by his contestation, that, at the date of the registration of his mortgage, on 3rd Sept., 1859, no previlege could attach in favour of Her Majesty; that, at that date, Monk, Coffin and Papineau did not owe the Government anything; that the bond of date 26th Sept., 1844, was not descriptive of any lands, and the claim of Her Majesty must go after the registered claim of George Henry Monk; that said bond did not cover any such claim as that now collocated in favour of the Attorney General; that the bond was only available to third persons; "That the item "8 of the judgment of distribution is unfounded and illegal, "in withholding from George Henry Monk \$1977.91 men-"tioned in it, and the Queen's claim embracing that sum, was " and is unfounded in fact and in law, and said sam, in any "the worst event, for him, George Henry Monk, ought "to be disallowed to Her Majesty, and added to the sum "awarded to him, George Henry Monk, by the last item of "the judgment of distribution." Further, that the claim for Her Majesty, could not be made by the Attorney General for the Province of Quebec, but by the Dominion of Canada. The answer of the Attorney General was Conclusions, &c. that, by the registration of the bond, the Queen acquired a hypothèque. The condition of the bond was in the... "Now the condition of the bond is such that if Samuer X entworth Monk, William Craigie Holmes Coffin, and Louis " Joseph Amédée Papineau shall well and truly demean them-"selves, in the execution of all and every the duties of the office of joint prothonotary and clerk of Her Majesty's "Court of Queen's Bench, aforesaid, in civil matters, and shall " truly pay over all money to be levied or received by them, as "such joint prothonotary and clerk, as aforesaid, to all and "every the person and persons lawfully entitled to receive "the same, then and in such case, the above written bond " shall be void and of no effect, &c." The opposition by the Attorney General for Lower Canada appears to be justified by 30 Vic., c. 3, s. 135. The rule laid down C. C. 1899 cannot apply to the joint occupants of the office of protonotary. The

chief question is whether the Crown has a privilege under the bond of 26th Sept., 1844, registered 7th March, 1845. The ordonnance 4 Vic., c. 30, required registration of bonds and obligations, among other things, but legal hypothecs of which this bond was one, when registered, existed without description of land to be charged until Sept. 1, 1860, when they were placed on the same footing as judgments. Before that time, they differed from judgments in this that they affected future as well as present property, whereas the operation of judgments had been limited by 4 Vic., c. 30, s. 30, to lands at the time of registration in the possession of the debtor. Ramsay, for the contestation, contends that the ordinance of 1669, which created privilege in favour of the Crown (fisc) in customary France, was not operative in Canada, from want of registration in the Conseil Supérieur at Quebec. That may be, but there were certain ordinances which were not so registered, but which nevertheless were always looked upon as if law in Canada. The ordinance of 1669 may be in that position. Bonner, in his treatise on the Registry Laws, pp. 80, 81, assumes that it and the dicta of Pothier, Basnage and Domat, based on the ordinance, were law in this country. At any rate, there is the jurisprudence of the Courts which, for nearly 100 years, have given the Crown the privilege of prepayment out of the moneys of its debtors. The English public law gives the Crown the privilege. 3 Comyn's Dig. Vo. Debt to the King, G.8, pp. 397, 399; Chitty, Prerogative, p. 381; 3 Burge, Colonial Laws, 318; Broom's Maxims, p. 49; Chalmer's Opinions, p. 362. Our code has laid down its rules on this matter, C. C. 2027, 2028, 2032. The judgment is as follows: "The Court, considering that, at and before the registration of the mortgage, hypothèque, in favour of G. H. Monk, registered 3 Sept., 1859, there was a hypothèque and privilege by the jurisprudence of the country in favor of our Sovereign Lady, the Queen, under the bond of date the 26th Sept., 1844, registered on the 7th March, 1845 on the property present and future of her debtors; Considering that such bond covered claims of the nature of those for which the Attorney General was collocated; Considering that the opposition and claim of the Crown was rightly made by the Attorney General for the Province of Quebec, and that, therefore, under the circumstances of this case, the contestation of G. H. Monk, and of contestants par reprise d'instance is unfounded in law. Doth dismiss said contestation with costs, &c." (17 J., p. 57; 3 R. C., p. 77.)

St. Pierre, for the Attorney General. R. A. Ramsay, for G. H. Monk.

CLOSE vs

Jugé:—deur, lorse

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(1) Le den liers comme poursuite en qu'il soit per cette cause, v met et al. vs. J., p. 179. V. Montréal, 3 j

Une vente possession du table propriét sier qui a fe fraude et col a fait la sais demandeur su demandeur su (Ouimet et al. 1858, LAFONT renversant le J., p. 35; 4 J

ENQUETE.-TEMOIN.

COUR SUPÉRIEURE, Montréal, 27 mars 1872.

Coram MACKAY, J.

CLOSE vs DIXON et al.

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Jugé:—Que le défendeur peut examiner comme témoin, son co-défendeur, lorsque leurs défenses sont plaidées séparément.

Dans cette cause les défendeurs plaidèrent séparément à la demande. A leur enquête, le juge présidant les enquêtes, TORRANCE, J., permit aux défendeurs de déposer l'un pour l'autre. Le demandeur s'y objecta, et fit, le 24 février 1872, une motion in banco, pour faire renverser cette décision. La Cour a renvoyé la motion, et a permis l'audition des défendeurs, comme témoins les uns pour les autres.

PER CURIAM: Bernard Close died at Montreal, leaving plaintiff, his brother, and his mother, one of the defendants. He made a will, which the plaintiff contests, on the ground that he was insane at the time, and that there was a conspiracy between his mother and Mullins, another of the defendants, to defraud him, for the benefit of two charitable societies. The judge, at enquête, allowed the defendants, who severed in their defence, to be examined, each for the other. Plaintiff now moves to reject this evidence. I do not think much weight ought to be attached to it, as the defence of one is really that of all; but, in Ouimet vs Senécal, 3, L. C. J., p. 182, (1) Judge BADGLEY a'lowed this, and in David vs McDonald, 5

(1) Le demandeur, qui a fait vendre, par vente judiciaire, des effets mobiliers comme appartenant à son débiteur, et qui est mis en cause dans une poursuite en annulation de cette vente, comme simulée et frauduleuse quoiqu'il soit personnellement exonéré de toute fraude, ne peut être témoin dans cette cause, vu que les parties dans une cause ne peuvent être témoins. (Ouimet et al. vs Sénécal et al., C. S., Montréal, 28 mai 1859, C. MONDELET, J., 3 J., p. 179. Voyez en sens contraire, dans la même cause, la décision de C. S., Montréal, 3 juin 1859, BADOLEY, J., 3 J., p. 182.)

Une vente de meubles faite à la poursuite d'un créancier du défendeur en la possession duquel ils se trouvent, peut, sur une poursuite intentée par le véritable propriétaire des effets vendus, contre le demandeur sur la saisic, l'huissier qui a fait la vente, le défendeur et l'adjudicataire, être annulée_pour fraude et collusion concertées entre le demandeur sur la saisie, l'huissier qui a fait la saisie et la vente, le défendeur et l'adjudicataire, quand même le demandeur sur la saisie et la vente serait exonéré dans la déclaration du demandeur sur la demande en nullité, de toute participation à la fraude. (Ouimet et al. vs Sénécal et al., C. B. R., en appel, Montréal, ler septembre 1858, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., et CARON, J. (dissident), renversant le jugement de C. S., Montréal, 30 septembre 1859, SMITH, J., 3 J., p. 35; 4 J., p. 133, et 8 R. J. R. Q., pp. 139 et 142.)

L. C. J., p. 164, (1) Judge BERTHELOT allowed it, after consultation with the other Judges. I am disposed to allow it to remain in the record, and at the final hearing, the Court can do with it as it sees fit. Motion rejected. (4 R. L., p. 141.)

Doutre, Doutre & Doutre, avocats du demandeur. Leblanc. Cassidy & Lacoste, avocats des défendeurs.

INSANITY.-EVIDENCE.

SUPERIOR COURT, Montreal, 30th December, 1872.

Coram Johnson, J.

Close vs Dixon et al.

Held:—That when a person is once plainly proved to have been insane the existence of a lucid interval requires the most conclusive testimony to establish it; and the validity of a will made during an alleged lucid interval will not be presumed in the absence of such testimony,

JOHNSON, J.: This action is brought in the special form of a demande en faux. The plaintiff is James Close, the brother of the person who is said to have made, on the 23rd December, 1870, the instrument, in the form of a will, which is attacked by the present proceeding; and it is directed against six defendants, viz.: 1. Margaret Dixon, the mother of the deceased Bernard Close; 2. James Mullin; 3. Jos. E. O. Labadie, N. P.; 4. George Weekes, N. P.; 5. The Directors of the St. Patrick's Orphan Asylum; 6. Les Directeurs et Syndics de la Maison de Refuge de Ste. Brigitte de Montréal. The object of the present proceeding is, 1. To have it adjudged and declared that the instrument impugned is null and void and of no effect, Bernard Close having been, at the time it was made, deprive I of reason, memory, and judgment, and incapable of declaring it to be his will; 2. That Bernard Close be, therefore, declared to have died intestate, and having left only his mother and brother as his representatives, that plaintiff be declared to have inherited by law one-half of his property; 3. That the two corporations who are defendants have no

right in th Margaret to pay bac 5. That d and sever have recei fyled app the two co the instru it is in no 1 dangerous he made is previous of until his d interdicted but affirm it is soug incident to observed, interested ment, on Notwithst importance reality, on tion of fa this: Was he made th fact, depen of other fa weighed w nard Close mere zeal a not go for but, if he complexion the recipies the face of must be he freely, it w most wishe the whole q ment was n the lost me of madness though his ment is the

The questi-

⁽¹⁾ Sous les dispositions des sections 49 et 51 du chap. 57 des Statuts du Canada de 1860, 23 Victoria, intitulé: "Acte concernant l'administration de "la justice dans le Bas-Canada," le constructeur d'une bâtisse peut être examiné comme témoin, en faveur de l'achitecte, dans une poursuite intentée contre eux, par le propriétaire de la bâtisse, pour réclamer d'eux, conjointement et solidairement, des dommages résultant de vices de construction. (David vs McDonadé et al., C. S., Montréal, 28 février 1861, Berthelor, J., 11 D. T. B. C., p. 116, et 9 R. J. R. Q., p. 79.)

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Statuts du tration de sêtre exas intentée conjointetion. (Datr, J., 11 right in the succession or property of the deceased; 4. That Margaret Dixon, being entitled only to her half, be condemned to pay back to plaintiff one-half of what she has received; 5. That defendants, Mullins, Labadie and Weekes, be, jointly, and severally, condemned to pay back to plaintiffall they have received, the whole with costs. All the defendants have fyled appearances, and three of them, Margaret Dixon, and the two corporations, have pleaded. They admit the making of the instrument impugned, in its apparent form, but allege that it is in no respect invalid, the testator having been, although dangerously ill, yet not deprived of his reason at the moment he made it, though after having done so he relapsed into his previous condition of sickness, and continued in that state until his death. The plea admits that Bernard Close was interdicted on the 10th January, three days before his death; but affirms the validity of the will on every ground on which it is sought to attack it. All the forms and requirements incident to this special form of proceeding have been carefully observed, and nothing is even suggested by those who are interested in maintaining this will against the exact fulfilment, on that score, of all the requirements of the law. Notwithstanding the immense volume of this record, and the importance of the case to the parties concerned, there are, in reality, only two points to be considered. The first is a question of fact, the second one of law. The question of fact is this: Was the testator of sound and disposing mind, when he made this will? I say this is really the only question of fact, depending, of course, for its solution upon a multitude of other facts and considerations, all of them, however, to be weighed with reference to this simple enquiry: " Did Bernard Close know what he was about?" Beause if he did, the mere zeal and officiousness of those who surrounded him wi'l not go for much to invalidate a free expression of his will; but, if he did not, their conduct assumes a very different No better objects could perhaps be selected as the recipients of his bounty than the two charities to which on the face of the instrument they are bequeathed; but, then, it must be he who is to be allowed to select them. If he does so freely, it will matter little that it is done in favour of those who most wished as most sought it, or most strove for it, but that is the whole question. The plaintiffs say that, when this instrument was made. Bernard Close had only the failing form and the lost mental powers of a man dying of a well defined form of madness. The defendants contend that his mind was serene, though his bodily strength was failing; and that this instrument is the plain and uncontrollet expression of his wishes. The question of law is a very simple one indeed, and need

only be stated to be decided. On the one hand, if Bernard Close made a free, intelligent and uncontrolled declaration of his will the present action must be dismissed. If, on the contrary, this is not his will, but a mere form and pretence wickedly contrived to have the appearence of what it is not in reality, the conclusions of "e declaration must be granted. In investigating the facts of the case, I have had to examine with attention seventy-one written depositions, taken at enquête to criticise and analyse both examination and cross-examination, and very often re-examination, to weigh contradictory stataments; to consider the bias of interest, position, feeling. and the complex various other motives that influence human testimony; to read a great variety of written instruments; to verify a series of dates, and understand a conflicting mass of villainous calligraphy, requiring, in some instances, the skill of an expert, and, upon the whole, to exercise, in my single person, and, by my unaided discrimination, the collective power of twelve jurymen as a preliminary. Such a task, when it has once been accomplished, is far too uninviting to be renewed without necessity here. If, in addition to the duty of a judge, the law of this country casts upon me, in every case, the labour of twelve jurymen, I will exercise it as a jury does by declaring what I find upon the facts, either for the plaintiff or for the defendant. I am not bound, in addition to the labour of arriving at a verdict, to give an essay upon the facts in support of it. It is no part of the office of a judge to convince or to persuade, though it is to expound and to decide. Upon the facts of this case, then, I shall only say that the so-called last will and testament of Bernard Close is that of a madman, incontestably proved so to have been, for a considerable time previous to its alleged execution. It cannot be even plausibly denied that the condition of this man, from the 10th of December, 1870, to the time of his death, was other than a condition of "dementia," constant in its duration, though of variable severity. It is not, as I gathered from the argument of defendant's counsel. in effect denied that such was the case; but what is contended for, is that, although he cannot be said to have been, from the 10th of December, in a sound condition of mind, yet, that there did, in point of fact, occur a lucid interval, plain in its charater, and of sufficient duration, at the moment when the instrument was executed. That is the extent of defendant's pretension, and it is no doubt sufficient, if it is true. Now, the rule of law, on this subject, is, so to say, reversed; it is different from the general rule on the subject of insanity. The law generally presumes all persons to be sane, and that presumption only dissappears upon conclusive proof to the

contrary; insane, as requires tl this point. dealing wi tator. I do of the evic in Taylor Stille's wo or partial ristics: 1s skill, and e bearings ar cable, from to observe person who a considera anterior to dementia c proof of a to me, incre more valua taken toget his malady given for l absence of give his ev and which, opinions of symptoms, still less by tent witness selves and e mind agains patient, wh confession, a are usual i after readin: as believed i incurred wh responsibilit them, if he l suaded, there sion of the t unofficial che have acted f be what it w ernard tion of he conretence not in ted. In ne with enquête -examidictory feeling, human iments: g mass ces, the , in my collec 1 a task. iting to a to the me, in ise it as s, either ound, in give an rt of the it is to , then, I ment of roved so alleged the con-0, to the mentia, v. It is counsel. ntended en, from nd, yet, al, plain nt when f defenis true. eversed; nsanity. nd that

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contrary; but, when a person in once plainly proved to be insane, as this man was, the existence of a lucid interval requires the most conclusive testimony to establish it. Upon this point, the authorities are numerous and conclusive. dealing with the subject of the state of mind of the testator, I do not attach much importance to a very great deal of the evidence of record. I have followed the rule laid down in Taylor's Medical Jurisprudence, and, also, in Warton & Stille's work, § 33; "Testimony to establish lucid intervals, or partial or general insanity, must possess two characteristics: 1st It should come from persons of general capacity. skill, and experience, in regard to the whole subject, in all its bearings and relations; 2nd. It should come, as far as practicable, from those persons who have had extensive opportunities to observe the conduct, habits, and mental peculiarities of the person whose capacity is brought in question, extending over a considerable period of time, and reaching back to a period anterior to the date of the malady." I find the evidence of dementia clear, authoritative and uncontradicted. I find the proof of a lucid interval vague, contradictory, interested, and to me, incredible. I consider the evidence of Dr McCallum more valuable upon these points than all the other depositions taken together. His acquaintance with the patient, and with his malady and its history, the plain and cogent reasons given for his conclusions, his obvious good faith and total absence of all interest in the suit, all these considerations give his evidence a weight with me that I find irresistible, and which, indeed, is not the least disturbed by the speculative opinions of another doctor, speaking from a description of symptoms, instead of a view of the symptoms themselves, and still less by the statements of other less educated or competent witnesses, all more or less in contradiction with themselves and each other. I find it also impossible to close my mind against the strong impression made by the fact that the patient, who was a zealous Roman Catholic, died without confession, and without receiving the last sacraments which are usual in his church, and I cannot help asking myself. after reading all the evidence of the efficacy of these rights as believed in by those of his faith, whether he would have incurred what to him must have appeared the tremendous responsibility of facing death without being a partaker of them, if he had had the possession of his faculties? I am persuaded, therefore, that this instrument was not the expression of the testator's will at all, that those who, in official or unofficial character, procured or participated in its execution have acted from a mistaken view of duty in certifying it to be what it was not. I do not notice the fact of interdiction in this case which, though it took place after the date of the will, took place, I have no doubt, for causes existing at the time the will was made, and, therefore, by law, may have an influence upon it, because, I deem it unnecessary to go beyond the facts which, to my mind, conclusively prove that Close was incapable of making a will, and that, being so incapable, the Court is not bound to go beyond the consideration that, in reality, he died intestate. As to the influences under which this pretended will was made, as I understand the case, they cannot strictly be made a ground of judgment against the instrument itself. It was said by Chief Justice Shaw, in the case of Woodbury vs Obear, that "evidence tending to show that the testator was of feeble mind, and believed in ghosts and supernatural influences, had some tendency to show unsoundness of mind, and that weakness of mind, which would be easily imposed upon by the exertion of undue in-There is no inconsistency in the verdict which finds both that the testator was of unsound mind, and that he executed his will under indue influence." That may no doubt be very good doctrine, in cases of partial insanity, or of ability. more or less questionable, in a testator to understand what he was about. But, in the present case, I am far from satisfied that Bernard Close ever executed a will at all, unless the mere mechanichal act of signing, that itself being even doubtful, can be called executing this instrument. In my opinion, it can hardly be called his act at all, it was the act of those who surrounded him. It is not a question of influence in getting him to do a thing which he more or less understood the nature of, but of wickedness, in pretending that he participated in any sufficient sense in a thing done altogether by others. I do not say, therefore, that this so-called will was made by Bernard Close acting undue influences; I say that he never acted intelligently at all, and that others acted for him, though I am far from thinking that the conduct of those who are responsible for this shameful proceeding are any less blamable on that account. I find it very difficult to understand how Labadie and Mullins can consider themselves justified in acting as they did. As regards poor old Mrs. Dixon, aged 90 years, and Mr. Weekes, whose deplorable condition is evident, and admitted, they are more objects of pity than of censure. If the two former considered themselves to be promoting a work of piety and charity, by what they did, I can only inform them that such notions of piety are not conformable to the law of the land. Under all these circumstances, the plaintiff might have asked perhaps more than I understood to be his pretension at the hearing. He might have expected that Labadie and Mullins should have been

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Held:—The and an escap responsible, the cannot recove deceased contribute with a 1

JOHNSON, dry, who pe on the night action, as v quality of marriage w inconvenien cellar, and h repair it. V question wh would deper Company v consumer; u own regulati of those regu be laid by t public street will be at t and fittings : meter, may condemned to pay costs at the least; but he has contented himself with asking a condemnation only against those who have contested the action, Mrs. Dixon and the two corporations, and, against them, the judgment must go, according to the conclusions of the declaration with costs. Whilst against Labadie, Weekes and Mullins, it will be dismissed, but without giving them costs against the plaintiff, who had the best reasons for including them in this action. (17 J., p. 59; 4 R. L., p. 141.)

DOUTRE, DOUTRE & DOUTRE, for the plaintiff. LEBLANC, CASSIDY & LACOSTE, for the defendants.

CONTRIBUTORY NEGLIGANCE.

SUPERIOR COURT, Montreal, 30th December 1872.

Coram Johnson, J.

VALLÉE ès-qualité vs The New City Gas Company.

Held:—That, where a Gas Company has introduced pipes into a house, and an escape of gas occurs, at a point for which the Company are responsible, the widow of a person killed by an explosion of the gas cannot recover damages against the Company, if it appears that the deceased contributed to the accident by his negligence in going to the place with a light in his hand.

Johnson, J.: The plaintiff is the widow of Theodore Beaudry, who perished by an explosion of coal gas, in his dwelling, on the night of the 11th Feb., 1872, and brings the present action, as well in her own behalf, as such widow, as in her quality of tutrix to her four minor children, issue of her marriage with her deceased husband. The family had been inconvenienced for some time, by an escape of gas in the cellar, and had complained to the Company, who neglected to repair it. Whether they were bound to do so, or not, is a question which I will not examine now in detail. Its decision would depend upon a reasonable construction of what the Company undertook to do by their contract with the consumer; upon which the Company cannot complain, if their own regulations are invoked for an explanation. Nos. 6 and 8 of those regulations are as follows: 6. "All service pipes will be laid by the Company to the inside of walls adjoining the public streets, at their own expense; but any extra length will be at the expense of the applicant." 8: "The tubings and fittings for the conveyance of gas, after it has passed the meter, may be put up by any gasfitter employed by the

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than might been consumer, or proprietor of the premises, the whole, however, subject to the approval and inspection of the Company's inspector." The exact place at which this gas escaped is proved to have been at a point in the service pipe occurring before it had reached the meter; and, though this is not the point upon which the case turns, I feed bound to say that the only rational view of the Company's obligation in this respect, and one which is in entire accordance with the terms published by them as those on which they carry on their trade, seems to me that the Company must have the exclusive right and control of that part of the service pipe which precedes or occurs before it reaches the meter; and that they could not carry on their business at all unless the meter could be depended on to perform its office, which, of course, it could not do if the pipe that supplies it is to be at the mercy of the consumer. I think it right, therefore, to say in view of the great risks to which gas consumers are liable, that the view I should be disposed to take of this part of the case would be against the defendants. The broad principle, however, upon which this case turns is that of contributory negligence. The Company having introduced the pipes for the supply of gas, and the escape being proved to be at a point for which they were responsible, they are liable for all direct consequences of their negligence, which may arise without any material contribution on the part of the plaintiffs. By their negligence, instead of furnishing as safe a supply of gas as they might have done through a good pipe, they serve a noxious supply through a defective pipe. They fill plaintiff's house not with a safe means of illuminating it, which was what they were paid for, but with something intolerable to smell, injurious to health, and dangerous to life in ordinary circumstances of any household, for it can hardly be said that if, as in the present case, there is sickness in a family and a night light in a bed-room, the patient would be responsible as a contributor to an injurious explosion of coal gas with which the Company might by their own negligence have filled his bedroom. Whatever difficulties such a case might present do not arise here. In the present case, the unfortunate deceased knew where the leak was, he had compained of it. He had been warned by the very terms of the r gulations of the Company that supplied him with gas, that, in such a case, he must not go near the source of danger with a light. Nevertheless, knowing all this, and probably thinking himself safe. inasmuch as a servant had just preceded him with a light near the same spot, and had escaped without injury, he unfortunately goes with a lighted lamp or candle in his hand,

the expl generally neither c be severe unfortun plain (at substance company conseque negligenc sufferer. proved to tions of a that the or the fla explosion, deeply to who deriv injury to I may a 5th volum contains a cases in E That case Common chap. 125. Wightman well, and (Justice W " correctne " rule is, th "the part " exercise o " the defen " ordinary author of " Mann, 10 B., says: " " negligence " viz., that " from reco "that he " consequenlaw, if it h circumstance On the contr

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the explosion occurs, and he is killed. The law may be generally stated to be, that where both parties are to blame neither can recover. Its application in the present case will be severely felt by the innocent widow and children of this unfortunate gentleman; but I am afraid that it is quite plain (at least it is so to my mind) that, if any explosive substance or fluid be supplied by the negligence of a company or person, they will only be responsible for the consequences that may flow exclusively from their own negligence, and not for those that are contributed by the sufferer. In the case of gunpowder, or coal gas, which is proved to be explosive in combination with certain proportions of atmospheric air, when a light is applied to it, I think that the party who should supply the spark to the one, or the flame to the other, is an essential contributor to the explosion, and that being the case here, the innocent and deeply to be commiserated representatives of the deceased, who derive their right from the circumstances attending the injury to the deceased, have I think no right of action. I may add that the case of Tuff vs Warman, in the 5th volume of the Common Bench Reports, N. S., page 573, contains a review of all that has ever been said in leading cases in England on the subject of contributory negligence. That case was an appeal, under the 35th sec. of the English Common Law Procedure Act of 1854, 17 and 18 Vict., chap. 125. It was argued, on 10th May, 1858, before Justices Wightman, Erle, and Crompton; and Barons Watson, Bramwell, and Channell, six English Judges. It is there said by Justice Wightman: "The law is laid down with perfect " correctness in the case of Butterfield vs Forrester; and that "rule is, that, although there may have been negligence on "the part of the plaintiff, yet, unless he might, by the " exercise of ordinary care, have avoided the consequences of "the defendant's negligence, he is entitled to recover: if by "ordinary care he might have avoided them, he is the " author of his own wrong." That was followed by Davies vs " Mann, 10 M. and W., 546, where the learned judge PARKER, B., says: "It appears to me that the correct rule concerning " negligence is laid down in Bridge vs The G. Junc. R. Co., "viz., that the negligence, which is to preclude a plaintiff " from recovering in an action of this nature, must be such as "that he could, by ordinary care, have avoided the "consequences of the defendant's negligence." This rule of law, if it has ever been apparently relaxed according to circumstances of peculiar cases, has never been departed from. On the contrary, in the case of Tuff vs Warman, that I have just cited, and in all the text books on the subject of torts, TOME XXIII.

the doctrine is mentioned that "the defendant is not excused " merely because the plaintiff knew that some danger existed "through the defendant's neglect, and voluntarily incurred " such danger." This is said on the authority of Clayards vs Dethick, 12 Q. B., 439; and, as it seemed to come nearer the present case in point of principle than any other that I have seen, I examined it by itself: That was a case where the plaintiff's horse was killed by falling into a trench which the defendants had made and insufficiently guarded. Patteson, J., in that case said: "The defendants had clearly no right to " leave a trench open in the passage to this mews, and to tell "the plaintiff you shall keep your horse in the stable until " we tell you that you may remove him. But whether or not "the plaintiff contributed to the mischief that happened "by want of ordinary caution, is a question of degree. "If the danger was so great that no sensible man would have " incurred it, the verdict must be for the defendants: and the " case was rightly put to the jury as depending on this ques-"tion. The plaintiff here had passed safely in the afternoon "over the place where the accident happened. According " to the evidence for the defendants, he was told, on attempt-"ing to pass in the evening, that he could not do it without "incurring danger to himself and the men below. The jury, "however, did not believe this statement. The whole question " was whether the danger was so obvious that the plaintiff " could not with common prudence make the attempt." Coleridge, J., said: "The question is, not only whether the defen-" dants did an improper act, but also whether the injury to the " plaintiff may legally be deemed the consequence of it. The " defendants say that the injury was the result of his own " wrong-headedness in attempting to pass when he was told it " could not be done without risk. Then, was the question on "this point properly left to the jury? I understand the Lord "Chief Justice to have expressed himself strongly against the "view taken by the defendants' counsel, but to have put the " question in a manner that appears correct, namely, whether "the plaintiff acted as a man of ordinary prudence would have "done, or rashly and in defiance of warning." So that this case of Clayards vs Dethick very clearly confirms the rule of law that I have applied; and in the case of Tuff vs Warman. that I noticed at first, it is also stated as part of the judgment of Mr. Justice Wightman that the rule of law was affirmed in Clayards vs Dethick—the difference between that case and the one now before me being in point of form merely. There it was held that what was the amount of danger. and the circumstances which led the plaintiff to incur it are questions for the jury. Here, unfortunately, they are for the

judge, languag was so warned to have costs, as

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Jugé:—Que cassation de cause de pre

Le tarif, nant pas d règlement, sous l'opér dans son j que la tax lère classe p. 69)

DOUTRE, D. D. Bo judge, and I find that under the circumstances, to use the language of Patteson, J., in *Clayards* vs *Dethick*, the danger was so great that no sensible man, especially when expressly warned by the conditions of his contract not to do so, ought to have incurred it. The action is dismissed, but without costs, as each party contributed to the accident. (17 J., p. 63)

DOUTRE, DOUTRE & DOUTRE, for the plaintiff.

LEBLANC, CASSIDY & LACOSTE, for the defendants.

PRAIS DANS LES AFFAIRES MUNICIPALES.

COUR DE CIRCUIT, Montréal, 16 mai 1872.

Coram MACKAY, J.

Louis Bourbonnais et al., requérants, et La Corporation du Comté de Soulanges, intéressée.

Jugé:—Que les frais dans une demande, par voie de requête en cassation de règlement municipal, doivent être taxés, comme dans une cause de première classe, non appelable, de la Cour de Circuit.

Le tarif, fait antérieurement au Code Municipal, ne contenant pas de dipositions applicables à une cause en nullité de règlement, non par voie d'appel, mais par requête en cassation, sous l'opération des arts 698 et suivants, l'Hon. Juge a inséré dans son jugement le règlement suivant: "La Cour déclare que la taxe doit être la même que dans les causes de lère classe de la Cour de Circuit, non appelables." (17 J., p. 69)

DOUTRE, DOUTRE & DOUTRE, pour les requérants.

D. D. BONDY, pour la corporation.

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CERTIORARI.

SUPERIOR COURT, Montreal, November 1870.

Coram TORRANCE, J.

Ex parte, on application of Jerome Cayen, Petitioner for writ of Certiorari, and The Mayor et al., Prosecutors, and John P. Sexton, Recorder.

Held:—1st. That it was not competent to a defendant questioning the summary jurisdiction of justices of the peace to set up jus tertii.

2nd. That the Court could not here try the question of jurisdiction, the Recorder of Montreal being exempted from taking evidence in

writing.

PER CURIAM: This case is before the Court, on a motion of petitioner, Jerôme Cayen, to quash a conviction of the Recorder, John P. Sexton, and on a motion of the prosecutors, the Corporation of Montreal, to quash a writ of certiorari. A complaint, on the 19th June last, was lodged against the petitioner, before the Recorder's Court, that he had, on the 17th June, obstructed St Léon street, in the City of Montreal, by depositing firewood on the street, without having previously obtained the permission of the City Inspector. The defendant pleaded to the complaint that the Corporation had never been proprietors or in possession of the pretended street, called St. Léon street, which had never been inscribed on the Register of streets of the City, nor homologated; that the Board of Public Works alone has the control of the piece of land in question which is not a public street; and the defendant is not guilty in the manner and form as complained. The defendant was fined \$20, and costs.

DUHAMEL, for the petitioner, contended that, from the moment that the question of property was raised, the Recorder was ousted of his juri-diction, and that the C. S. C.

chap. 91, s. 46, should apply.

DEVLIN, for the Corporation, cited 1 L. C. Jur., 162, In re-

Ira Gould, 2 R. J. R. Q., p. 376.

PER CURIAM: It has always been held, as a maxim, that where the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted Paley, on Convictions, p. 137. But the claim of title must be on behalf of the defendant, or those through whom he claims and he cannot set up a just ertii, Cornwell vs Sanders, 3 B. & S., 206. Further, as has been laid down in re Ira Gould.

1 L. C. J jurisdict statute in The mon motion p. 74)

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Held:—1° question the to bring an a 2° Th t, w is duly ather to the dethorization.

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(1) Le Statut der, pour la cité Impérial 3 et 4 v "Provinces of "Canada." Le artie du domain ère la propriété, Gould, requéran t C. MONDELET, 1 L. C. J., 162 (1), the Court cannot enter into the question of jurisdiction from the Recorder being specially exempted by statute from the obligation of taking evidence in writing. The motion of the petitioner will therefore fail, and the motion to quash the certiorari must be granted. (17 J., p. 74)

DUHAMEL & RAINVILLE, for petitioner. R. Roy, Q. C., B. DEVLIN, for the prosecutors.

DISAVOWAL OF ATTORNEYS .- MARITAL AUTHORIZATION.

SUPERIOR COURT, Montreal, 24th December, 1870.

Coram TORRANCE, J.

LEORY & vir vs Plamondon et al.

Held:—1° That a defendant has no interest to disavow or right to question the power or authority of the attorney ad litem of the plaintiff to bring an action.

2° Th t, when a writ and declaration allege that the female plaintiff is duly .athorized by her husband, party to the action, it is not competent to the defendant by an exception à la forme to question such authorization.

PER CURIAM: The defendants met the action by an exception à la forme, which alleged, inter alia, that the female plaintiff was commune en biens with her husband, but had instituted the action without his authorization, although such authorization was alleged in the declaration, and in the writ of summons. The plaintiffs have demurred to the exception à la forme: 1. Because it appears, by the writ of summons, that the female plaintiff was authorized to bring the action; 2. Because, in law, the defendants have no interest, and are not admissible to disavow the attorneys ad litem of the female plaintiff, authorized by her husband, and of the husband for the purpose of authorizing his wife.

The Court was with the plaintiff, and maintained the defense en droit: "Considering that it appears by the pleadings

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⁽¹⁾ Le Statut Provincial, 8 Victoria, autorisant la nomination d'un recorder, pour la cité de Montréal, est constitutionnel, et autorisé par le Statut Impérial 3 et 4 Vict., chap. 35, section 3, intitulé: "An act to re-unite the "Provinces of Upper and Louer Canada, and for the Government of 'Canada." Le louage par la couronne, pour 21 ans, d'un terrain formant artie du domaine de la couronne, constitue un bail emphytéotique qui transère la propriété, et soumet le locataire au paiement des taxes municipales (Gould, requérant certiorari, C.S., Montréal, 20 mai 1854, DAY, J., SMITH, J., t.C. MONDELET, J., P. D. T. M., p. 73, et 2 R. J. R. Q., p. 376.)

"and by the exception, and it is alleged by said exception, "that the writ of summons and declaration do aver that the "female plaintiff was authorized by her husband to bring "the present action;" and—"Considering that the defendants "are without interest to disavow the attorneys ad litem of plaintiffs, and have no power to question the power or authority of the said attorneys ad litem." McKercher & Simpson, 6 L. C. R., 311, 5 R. J. R. Q., p. 115, 14 R. J. R. Q., p. 371. Exception dismissed. (17 J., p. 75)

Duhamel & Rainville, for plaintiffs.

REAL ACTION-JURISDICTION.

SUPERIOR COURT, Montreal, 31st October, 1870.

Coram TORRANCE, J.

WHYTE, ès-qualité, vs Lynch et al.

J. G. D'AMOUR, for defendants.

Held:—That though a real action is only to be brought in the district where the immoveable in dispute is situated, C. C. P. 38, yet, an appearance, by a defendant, without pleading, or pleading to the merits of the action, is a waiver of an exception to the jurisdiction.

PER CURIAM: This is an action by John Whyte, in his quality of assignee to the insolvent estate of William Cairns, of Ormstown, in the district of Beauharnois. The conclusion of the declaration prays that certain deeds of sale, set forth in the declaration, be annulled and set aside, as simulated and fraudulent, and the immoveable described therein be declared to be vested in plaintiff, in his capacity, to be by him dealt with according to law. The first question submitted to the Court is a question of jurisdiction. There are four defendants in the writ of summons: Robert V. Lynch and William Emberson, both of New York, John Cunningham, of the village of Huntingdon, in the district of Beauharnois, and Themas Phillips, of the village of Durham, in the same district John Cunningham was served with the writ of summons, in the district of Montreal. The defendants, Robert V. Lynch. William Emberson and Thomas Phillips were not served, but were called in by advertisements. The defendants, Robert V. Lynch and John Cunningham, appeared by their several attorneys. The land in question is in the district of Beauharnois. Robert V. Lynch pleaded to the merits of the action that he was ignorant of the facts stated in the declaration and that William Emberson had no property in the Province

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of Quebec, and also an additional plea that plaintiff was not the assignee of the residence of William Cairns, and that the assignment to him was null. John Cunningham did not plead to the action. It was argued, for defendants, on the merits, that this Court had no jurisdiction by C. C. P. 37, 38. Art. 37 says: "In every real or mixed action, the defendant may be summoned before the Court of his domicile, or before that of the place where the object in dispute is situated." Art. 38 says: "In real actions, they should all be summoned before the Court of the place where the object in dispute is situated." "In mixed actions, before the Court of the place where the object in dispute is situated, or before the Court of the domicile of one of the defendants." The service in Montreal would only be good in a personal action. The action should have been instituted in the district of Beauharnois where the land was. The plaintiff denied that this was a real action. As to Lynch, the question was waived by his pleading to the merits. The Court could not pronounce upon this question of jurisdiction. It had been waived. The rule of the code was not à peine de nullité. Is the present action real? The Ancient Denisart, Vo Action, says: "Les actions réelles sont celles par le moyen desquelles on poursuit immédiatement des droits sur les choses." Ortolan, Comm. on the Institute of Justinian, vol. 2, p. 457, says: "L'action réelle, en général, est celle par laquelle le demandeur soutient qu'il a, abstraction faite de toute autre personne, la faculté de disposer d'une chose, corporelle ou incorporelle, ou d'en tirer plus ou moins largement profit. Si nous avons besoin d'intenter l'action, c'est parce que notre droit est méconnu, que quelqu'un y met obstacle, et qu'il faut recourir à la justice pour faire lever cet obstacle." It is impossible for the Court to come to any conclusion but that the present action is a real action. Has the objection been waived by the appearance of the two defendants, Robert V. Lynch and John Cunningham, without their fyling a declinatory exception? The rule may be stated as follows: The consent of parties cannot give jurisdiction, when wanting ratione materiae. It can only confer it when mere personal rights are involved, or where a defendant is sued before another judge than the one of his domicile, and he nevertheless appears and pleads to the merits, or does not plead at all. When jurisdiction is wanting ratione materiæ, the court is bound ex officio to notice it. Now, is the Superior Court, at Montreal, incompetent ratione materice to take cognizance of an action claiming real estate in the district of Beauharnois? The Court here is competent to take cognizance of real actions generally, and is, therefore, competent, ratione materia, to take cognizance of the present

action claiming an immoveable in the District of Beau-The authors would appear to be of opinion that the solution of the difficulty is in the solution of the question, whether the tribunal is either relatively or absolutely incompetent. If this Court be only relatively incompetent, the objection has been waived; if it be absolutely incompetent, then no acquiescence or waiver of parties could give jurisdiction. Thomine Des Mazures, in his commentary on art. 170 of the C. C. P. of France says: "Mais comment déterminer si un tribunal est incompétent à raison de la matière, ou si l'incompétence n'est que relative? Ce n'est pas toujours une question facile à résoudre. Nous estimons que la solution dépend du point de savoir si l'attribution de l'affaire a été faite principalement dans l'intérêt des parties, auquel cas l'incompétence n'est que relative, ou si elle tient principalement à des intérêts généraux, ou à l'ordre hiérarchique des pouvoirs, auxquels cas l'incompétence est à raison de la matière et absolue." Tem. 1, p. 322. Rogron, in his commentary on the Code of Procedure, in France, art. 170, tom. 1, p. 182, says: "Il y a incompétence à raison de la personne, ratione personæ, lorsque le défendeur est cité devant un autre tribunal que celui qui doit connaître de la cause, bien que les causes de la même nature soient placées dans les attributions de ce tribunal; ainsi, un tribunal de première instance peut connaître de toutes les affaires civiles; mais, si l'affaire est personnelle, elle doit être portée devant le tribunal du domicile du défendeur; si elle est réelle, elle doit être portée devant le tribunal du lieu où l'objet litigieux est situé; si elle est mixte, devant le tribunal du domicile du défendeur ou de la situation des lieux. Si donc, dans ces trois cas, le défendeur est cité devant un autre tribunal que celui indiqué par la loi, il pourra proposer le déclinatoire; mais comme cette indication est toute dans son intérêt, il devra le faire in limine litis, c'est-à-dire avant toutes exceptions et défenses." Rogron is plainly of opinion that, in a case like the present, the defendant should have fyled a declinatory exception, within the delays, if he wished to avoid a contestation, at Montreal, and not having done so, it is a waiver of the objection. Judgment for plaintiff. (17 J., p. 76)

J. J. C. Abbott, for plaintiff.

W. H. KERR, for defendant Lynch.

J. A. PERKINS, for defendant Cunningham.

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Held:—

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Vente, n° 1 McCord n° 29, p. 1: The Cou

R. L., p. 31 D. McCo GIROUAR

TRANSPER.—SIGNIFICATION.

.CIRCUIT COURT, Montreal, 28th February, 1871.

Coram TORRANCE, J.

McLennan vs Martin, & Martin, Plff. en faux, vs McLennan, Deft. en faux.

Held:—That it is necessary to serve upon a debtor a copy of the act of signification of transfer by his creditor to a third party.

The defendant was sued upon a deed of lease made by him in favor of André Herault dit Dominique, and, by the latter transferred to plaintiff, by deed of transfer of date 27th October, 1869 (P. E. Normandeau, N. P.). The plaintiff, by his declaration, alleged that a copy of the deed of transfer was duly signified upon defendant, on the 3rd November, 1869. In proof of this allegation, plaintiff produced a copy of the transfer, and acte of signification. The defendant inscribed en faux against this document, alleging, by his moyens de faux, "that portion of the said pretended signification of transfer, in which it is stated, by the said notary, that he served Joseph Martin with a copy of the signification of said transfer is false, namely, the words in the original and authentic copy of said signification, 'and also a copy of these presents,' are false, the notary not having served Martin with a copy of the said signification of said transfer, as he falsely states in said pretended signification that he did, and that the deed of signification of transfer is untrue, and false in that respect." The defendant en faux demurred to the moyens de faux, "because, by law, supposing said moyens de faux to be true, it was not necessary to serve upon said plaintiff en faux a copy of the deed of signification of the said transfer. Because the word impugned as false constitutes a mere surplusage."

Dugas, in support of demurrer, cited C. C. 1571; Troplong, Vente, no 109; A. Denisart, vo. faux principal, p. 452.

McCord, for plaintiff en faux, cited 2 Gr. Cout., art. 108, no 29, p. 132.

The Court dismissed the answer in law. (17 J., p. 78; 3 R. L., p. 31; 1 R. C., p. 245)

D. McCord, for plaintiff en faux.

GIROUARD & DUGAS, for defendant en faux.

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INSCRIPTION IN REVIEW.

SUPERIOR COURT, IN REVIEW.

Montreal, 21st December, 1872.

Coram MACKAY, J., BEAUDRY, J.

LENOIR DIT ROLLAND vs DESMARAIS et vir.

Held:—That an inscription under C. C. P. 497 (art. 1196 C. P. C. de 1897), may be made on the ninth day after judgment when the eighth day falls on a Sunday.

DUGAS, for plaintiff, moved, inasmuch as the judgment of which a review was sought had been rendered on the 30th November last, and the inscription in review was only fyled on the 9th December instant, that the inscription in review be declared null and void, as not having been produced within the eight days after the judgment. Vide C.C.P. 497.

Taillon, for defendants, è contra cited C. C. P. 3, 24; and Scatcherd vs Allan, 10 L. C. Jur., 201. (1)

PER CURIAM: The case of Scatcherd vs Allan furnishes the rule, and the motion is dismissed, with costs. (17 J., p. 81) GIROUARD & DUGAS, for plaintiff.

TRUDEL & DEMONTIGNY, for defendants.

(1) La section 21 du chap. 39 des Statuts du Canada de 1864, 27-28 Victoria, intitulé: "Acte pour diminuer les frais des ventes en justice et des "ratifications de titres, et pour faciliter la tenue des enquêtes, l'assignation" des absents, la distribution judiciaire des deniers, la saisie des rentes des absents, la distribution judiciaire des deniers, la saisie des rentes constituées représentant les droits seigneuriaux, et pourvoir à la revision des jugements en certains cas, dans le Bas-Canada," décrétait que dans le but d'obtenir la revision devant trois juges, d'un jugement définitif rendu à la cour supérieure ou dans toute cause susceptible d'appel à la cour de circuit: "la partie lésée devra, dans les huit jours de la date du jugement dont on se "plaint, déposer entre les mains du protonotaire ou du greffier ayant la garde du dossier, vingt piastres dans les causes au-dessous de quatre cents piastres, et quarante piastres dans toutes les causes au-dessus de cette somme, ou dans toute action réelle.... et elle pourra ensuite inscrire la "cause pour revision à Québec ou Montréal (selon le cas), signifiant l'avis "de l'inscription à la partie adverse ou à son procureur." Jugé que si edélai de huit jours, exigé par cette disposition pour l'inscription des causes et l'inscription peuvent être faits le jour juridique suivant. Jugé aussi qu'il n'est pas nécessaire que la signification de cette inscription soit personnellement faite à la partie adverse ou à son procureur. (Scatcherd vs Allan, C. S., Montréal, 31 octobre 1865, Badulley, J., Berrhellot, J., et Monk, J. A., 16 J., p. 201; 1 L. C. L. J., p. 96, et 15 R. J. R. Q., p. 486.)

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Torrance, plaintiff, purchase immoveal and such the deed s The Cour the action que, par 1 par la den stipulé qu Lenoir di absent de teurs se so ladite vent priétaire d ce que telle droit d'act présente i 308; 3 R. GIROUAF

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OBLIGATION CONDITIONNELLE.

COURT OF REVIEW, Montreal, 30th April, 1873.

Coram Johnson, J., MACKLY, J., BEAUDRY, J.

LENGIR vs DESMARAIS et vir.

Held:—That a clause, in a deed of sale of an immoveable, to the effect that such of the vendors as sign, bind themselves to obtain the ratification of the deed, by an absentee, is a condition precedent, and no action can be brought to recover any portion of the purchase money until such ratification has been effected.

This was a review of a judgment of the S. C., at Montreal, Torrance, J., rendered 30th November, 1872, in favor of plaintiff, who had sued for a balance of her share of the purchase money, payable under a deed of sale of an immoveable from her and others to defendant, in which she and such of the vendors who signed the deed undertook that the deed should be ratified by one Louis Lenoir, an absentee. The Court of Review reversed the judgment, and dismissed the action, assigning the following reasons: "Considérant que, par le contrat de vente du 8 mai 1862, fait et consenti par la demanderesse et ses auteurs, à la défenderesse, il a été stipulé que cette dernière ne serait pas troublée par Louis Lenoir dit Rolland, autrefois de Montréal, et maintenant absent de cette Province, et que la demanderesse et ses auteurs se sont faits fort, dans et par ledit acte, de faire ratifier ladite vente, par ledit absent, pour la portion dont il est propriétaire dans l'immeuble vendu, et considérant que, jusqu'à ce que telle condition soit remplie, la demanderesse n'a aucun droit d'action contre la défenderesse, telle que portée en la présente instance." Judgment of S. C., reversed. (17 J., p. 308; 3 R. C., p. 77)

GIROUARD & DUGAS, for plaintiff.
TRUDEL & TAILLON, for defendants.

INSCRIPTION EN FAUX.

Superior Court, Montreal, 29th February, 1872.

Coram BEAUDRY, J.

DUCHESNAY et al. vs VIENNE, & VIENNE, oppt.

Held:—That an alteration of the return day of a writ of Vend. $Exp.\ d_e$ Terris, made after the sheriff has commenced the execution of the writ

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8 Victo* e et de^s signatioⁿ s rentes revision e dans le f rendu à circuit: ont on se ayant la tre cents ascrire la nt l'avis que si le causes en le dépôt ussi qu'il C. S. R., k, J. A.,

by publishing his proceedings in a newspaper, is fatal, and all proceedings on such writ will be set aside, without the necessity of an inscription en faux.

This was an opposition afin d'annuler, complaining that, after the sheriff had commenced his proceedings under the writ of Vend. Exp. de Terris, by publication in a certain newspaper, the return day of the writ had been altered by the Prothonotary. The parties admitted (to save cost of examining the sheriff) that, were the sheriff examined as a witness, he would attest that the alteration was so made, but that, the newspaper having ceased to be published after the first advertisement, he had sent back the writ to the Prothonotary, who extended the return day, and then returned it to the sheriff, and that, after the writ was so amended, he made the nece-sary publications in another newspaper. And the admission was given in this form, under the express reservation of urging the necessity of an inscription en faux. The plaintiffs contended, that the alteration itself did not nullify the writ or the proceedings thereon, and, under any circumstances, that, without an inscription en faux, the writ and proceedings could not be set aside. The Court thought otherwise, and maintained the opposition, and quashed the writ, and all proceedings thereunder. Opposition maintained.

DORION, DORION and GEOFFRION, for plaintiffs. CARTIER, POMINVILLE and BÉTOURNAY, for opposant.

PUBLIC SALE OF IMMOVEABLE BY ASSIGNEE.

SUPERIOR COURT, Montreal, 30th January, 1872.

Coram MACKAY, J.

In the matter of Charles Léger dit Parisien, insolvent, and Andrew B. Stewart, assignee, and John G. Reither, petitioner.

Held:—That when an assignee improperly refuses a bid for real property offered by him for sale under the Ins. Act. of 1869, and adjudges the property to the previous bidder, the judge will set aside the adjudication, and order the property to be adjudged to the party whose bid was rejected.

PER CURIAM: This is a petition to set aside an adjudication of an immoveable, by an assignee, under the Insolvent Act. The assignee having obtained leave to sell the property

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of the insolvent, the conditions of the sale were fixed. terms were one-fourth cash, that is, on the passing of the deed, so that, fifteen days were allowed, in fact, for the production of the cash. Two lots had been adjudged to the petitioner, and he had bid for another lot, when he was told that his bid would not be received, unless he paid one hundred dollars down, and, when the man represented that he had no money with him, not having expected to be called upon to pay immediately, the assignee adjudged the property to the next neighbour. I see here improper conduct on the part of the assignee. He had no right to advertise that fifteen days would be allowed, and then demand cash, and I shall therefore set aside the adjudication to Mr Cardinal, the petitioner's neighbour, under costs against the assignee personally. The judgment was rendered accordingly and the assignee ordered to pass a deed of the property in due form to the petitioner. Petition to set aside adjudication granted. (17 J_{\cdot} , p. 84)

J. E. Bureau, for petitioner.

JETTÉ, ARCHAMBAULT & CHRISTIN, for Cardinal, adjudicataire.

TARIF.

COURT DE CIRCUIT, EN CHAMBRE, Montréal, 22 janvier 1873.

Coram MACKAY, J.

D'AMOUR et al. vs Bourdon.

 $Jug\ell:-1^\circ$ Que l'affidavit produit au greffe, pour obtenir ju ement, dans les causes par défaut ou ex parte, équivaut à la déposition d'un témoin en cour ; et que tel affidavit tient également lieu d'enquête ou de preuve.

2º Que, dans toute cause où jugement aura ainsi été obtenu, sur affidavit. l'honoraire de l'avocat sera le même que si tel jugement eût été

rendu sur la déposition d'un témoin en cour.

Les avocats des demandeurs, après avoir obtenu jugement, sur affidavit, firent taxer leur mémoire de frais, par le greffier, qui refusa de leur accorder l'honoraire d'une cause par défaut, ou ex parte, mais avec enquête. Ils présentèrent une requête par laquelle ils demandaient la revision de leur mémoire, de manière à ce que l'honoraire d'une cause réglée après enquête leur fût accordé, prétendant que l'affidavit tenait lieu d'enquête, et ils conclusient à ce que leur mémoire fût revisé en conséquence, et qu'il fût ordonné et déclaré qu'à l'avenir, l'honoraire de l'avocat, dans les causes par défaut, ou ex parte,

dans lesquelles jugement serait rendu sur affidavit, fût le même que si tel jugement eût été rendu sur la déposition d'un témoin en cour. Les autres juges présents partagèrent l'avis du juge MACKAY, et la requête fut accordée. (17 J., p. 85)
D'AMOUR & BERTRAND, pour les demandeurs.

ACTION EN BORNAGE.

SUPERIOR COURT, Montreal, 30th November, 1870.

Coram TORRANCE, J.

PATENAUDE vs CHARRON.

Hild:—In an action en bornage, that, where a division fence had existed, for upwwards of thirty years, between the properties to be bornées and one of the parties had enjoyed his possession, "franchement, publiquement, et sans inquiétation" for that period, he had a right to demand that the boundary be drawn according to this line.

PER CURIAM: This is an action en bornage, by which plaintiff prays that it be ordered that bornes be planted between the land of plaintiff and that of defendant according to law and the titles of the parties. The defendant meets the action by a first plea, alleging that he held his land, described in the plea, by donation from his father, by deed of date the 20th April, 1864, and that the land adjoined plaintiff's; that, for more than 30 years, before the institution of the present action, defendant has, as well by himself, as by his auteurs and predecessors, possessed the land in question, franchement, publiquement, continually and without interruption, peaceably and à titre de propriétaire, entre présents, agés et non privilégiés, and that he has, in consequence, acquired the proprietorship, by prescription, of 30 years, against all persons; that there is a division fence, between the land of plaintiff and that of defendant, and that this fence, and those there previously in the same line have always served as a liee of division, between the said lands, for more than 30 years bt fore the institution of this action, and that defendant, his au eurs and predecessors, have always possessed the land, within the limits fixed by the fence. The prayer of the plea was that it be ordered that the bornage be made, conformable to the possession which defendant, his auteurs and predecessors have had, of the land described in the plea, and within the limits of said possession. The second plea, in similar terms, invoked the ten years' prescription. The defendant has proved his possession for thirty years and upwards, with a boundary

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for a division fence, such as described in his pleas. The principal question submitted to the Court is whether the bornage is to be ordered simply, according to the titles, or according to the division fence separating the properties. The case of Ricard, appellant, and La Fabrique de la paroisse Ste-Jeanne de Chantal, 1 R. L., p. 713; 20 R. J. R. Q., pp. 468 et 512, decided in appeal, at Montreal, on the 9th June, 1868, has been cited by defendant as in his favour. It is so, and the Court gives an order in the terms of the order given in that case, by the Court of Queen's Bench. (1) The judgment was, as follows:

"La Cour, considérant que le défendeur, au temps de l'institution de l'action était propriétaire de l'immeuble décrit comme suit, savoir : (désignation de l'immeuble); Considérant que l'appelant, tant par lui-même que par ses auteurs et ses prédécesseurs, a possedé le dit immeuble, tel qu'il était actuellement enclos, pour plus de trente ans avant l'institution de la présente action, franchement, publiquement et sans inquiétation, et qu'il en avait, par là, acquis la prescription contre et à l'égard de toutes personnes quelconques, et même à l'encontre du demandeur, propriétaire du terrain contigu au dit immeuble; Considérant qu'il est établi, en preuve, qu'il existait une clôture de division, entre le dit terrain du demandeur, et celui du défendeur, laquelle clôture et celle qui existait auparavant, dans la même ligne, ont toujours servi de ligne de division, entre les terres des parties, depuis au delà des dits trente ans, avant l'action, et que le défendeur a toujours possédé sa terre suivant les limites désignées par les dites clôtures; Considérant que le défendeur a droit de requérir que le bornage, entre les parties, soit fait dans la dite ligne de division et des clôtures, telles qu'elles existent entre les terres contiguës des parties; Ordonne que, par arpenteurs, à être nommés par les parties, ou par un arpenteur, si les parties en conviennent, sinon d'office, par la cour Supérieure il sera procédé, suivant la loi, et d'après la pratique usitée en justice, au bornage et délimitation des terres des parties, en suivant la ligne de division, et la clôture maintenant existante entre les dits héritages, le bornage à être fait, et le rapport d'icelui a être rapporté devant la cour Supérieure, sans délai, pour, sur icelui, être ordonné ce que de droit, et, vu que le défendeur a nié tous les allégués de la déclaration du demandeur, par sa défense au fond en fait, et que le demandeur a nié tous les allégués des plaidoyers écrits du défendeur, la

⁽¹⁾ Authorities cited by appellant in Ricard & La Fabrique. Pothier; Société, n° 233; Troplong, Prescription, n° 119; Duranton, tom. 5, n° 260; Millet, Bornage, p. 383.

cour ordonne que chaque partie paie ses frais de l'action, et que les frais du bornage soient divisés entre les parties." (17 J., p. 85; 2 R. L., p. 624; 1 R. C., p. 121)

DUHAMEL & RAINVILLE, for plaintiff.
MOREAU, OUIMET & LACOSTE, for defendant.

OBLIGATION CONDITIONNELLE.

COUR SUPÉRIEURE, EN REVISION,

Montréal, 29 décembre 1871.

Coram MACKAY, TORRANCE, BEAUDRY, JJ.

LA SOCIÉTÉ PERMANENTE DE CONSTRUCTION DU DISTRICT DE MONTRÉAL vs LAROSE,

Jugé:—Que la stipuiation faite dans un acte de vente, par l'acquérenr, qu'il paiera, à l'acquit du vendeur, avec la réserve de déguerpir et de délaisser la propriété acquise par lui, au cas où il jugerait à propos ou à son avantage de le faire, ne le rend pas responsable personnellement au paiement de la dette, quoique cette indication de paiement ait été ensuite acceptée par le créancier et signifiée à l'acquéreur.

Par l'acte de vente, consenti par H. Lanctot au défendeur le 26 février 1868, le défendeur a acheté les terrains y décrits, et il fut stipulé qu'il paierait à la demanderesse l'obligation consentie en sa faveur, par Lanctot, en date du 15 janvier 1867. ainsi que toutes autres dettes hypothécaires grevant légalement les terrains; le défendeur se réservant le droit qu'il avait, par la loi, de déguerpir et délaisser. Le 16 octobre 1869, la demanderesse accepta cette indication de paiement, qui fut signifiée au défendeur, le 22 novembre 1869. La demanderesse poursuivit le défendeur personnellement, pour le recouvrement de cette créance. Le défendeur plaida qu'il n'était pas obligé personnellement à payer la créance de la demanderesse. La cour Supérieure, à Montréal (MONDELET, J.) maintint l'action de la demanderesse, le 30 janvier 1871. Ce jugement est comme suit: "La Cour, considérant que la demanderesse a " fait preuve des allégations de sa déclaration, et, nommément, " que le défendeur lui doit, et est tenu personnellement, pour " les causes et raisons en la dite déclaration, de payer la somme " de £445. 5.10, etc; Considérant que le défendeur n'a point " prouvé les allégations de son exception péremptoire, laquelle " est mal fondée, en droit et en fait, cette cour l'en déboute, et "condamne le défendeur à payer." Le défendeur inscrivit cette cause pour revision devant trois juges, à Montréal, et ce jugement fut renversé par le jugement suivant:

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"La Cour, considérant que, par l'acte de vente, consenti par " Hippolyte Lanctot, au défendeur, devant P. Mathieu, notaire, " le 26 février 1868, le défendeur a acheté les terrains y dé-" crits, pour le prix de \$3,200, sur et en déduction duquel prix, " il est stipulé, au dit acte, qu'il sera payé, pour et à l'acquit " du vendeur, qui y consent, à la Société Permanente de Cons-"truction du district de Montréal (savoir la demanderesse), "l'obligation consentie en sa faveur, par Lanctot, devant C. F. "Papineau, notaire, en date du 15 janvier 1867, ainsi que "toutes autres dettes hypothécaires grevant légalement les " dits emplacements, et légalement constituées et payables, et " la balance qui resterait serait payée au vendeur, ou à son ordre, à demande, et que l'acquéreur se réserva néanmoins "le droit qu'il a par la loi, de déguerpir et de délaisser les dits " emplacements, au cas où il le jugerait à propos, ou à son "avantage de le faire; Considérant que l'acceptation que la "demanderesse a faite de cette indication de paiement, par "acte du 16 octobre 1869, reçu devant L. N. Dumouchel, " notaire, ne pouvait être faite qu'avec la réserve portee au "dit acte du 15 janvier 1867, et ne peut priver le défen-"deur du droit qu'il s'est réservé, que cette réserve est "incompatible avec le lien direct et personnel que la deman-" deresse prétend exister, de la part du défendeur à son égard, " que la demanderesse ne pouvait, en conséquence, se pourvoir "ainsi qu'elle l'a fait, par une action personnelle contre le " défendeur ; Considérant que la cour Supérieure, siégeant en " première instance, a erré, en maintenant la dite action par " son jugement du 30 janvier 1861, renverse le dit jugement " avec dépens, et, procédant à ren lre le jugement que la cour "Supérieure aurait dû rendre, la cour ici présente déboute la "dite action de la demanderesse, avec dépens (1). (17 J., p. 87) TORRANCE, J., différant.

BONDY, avocat de la demanderesse. MAILLET, avocat du défendeur.

⁽¹⁾ Autorités de la demanderesse : Troplong, Priv. et Hyp., nº 344, in fine, et p. 813; C. C., art. 1029.

SUBSTITUTION OF ATTORNEY.

CIRCUIT COURT, Montreal, 6th March, 1873.

Coram TORRANCE, J.

MAILLET vs SÉRÉ.

Held:—That, after the appointment of an attorney in a cause, as stipendiary magistrate, no proceeding can be had in such cause until the party for whom he was acting has been called upon to appoint another attorney, and has made default to do so.

In this cause, the plaintiff applied to proceed to his proof. PAUZÉ, for defendant, resisted the application, on the ground that the attorney of defendant, Charles Ouinet, had ceased to act as an attorney, by accepting the office of stipendiary magistrate, in the district of Beauharnois, 32 Vict., ch. 23 (Quebec, 1869). He cited C. C. P., 200. The Court refused the application of plaintiff. (17 J., p. 139)

MAILLET, for plaintiff.
CHARLES OUIMET, for defendant.

PAROL TESTIMONY.

Superior Court, enquete sittings, Montreal, 18th January, 1873.

Coram Johnson, J.

BRUSH vs STEPHENS et vir, and STEPHENS et vir, Petitioners.

Held:—That under the Quebec Act, 35 Victoria, ch. 6, sect. 9, the right to examine a consort as a witness is conferred upon the adverse party only.

Johnson, J.: This is an application, made by a wife séparée de biens, and who is defendant in this case, to be allowed to examine her husband as a witness, to prove section sets of administration of her property. It is made recessions under sec. 9 of the 35 Vict., ch. 6, of the Quebec a giolarco. That statute amends Art. 252 of the Code of Constitution by enacting that, "If consorts are separated "as a represent, and one of them, as agent, has administered "property belonging to the other, the consort who has so "administered may be examined as a witness in relation to

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Held:—1° Corporation Corporation, "any fact connected with such administration; provided "the Court shall so order." I am of opinion that this extension of the law was made in the interest of the adverse party only. The mischief to be removed was, as every lawyer knows, that in cases directed against married women separees de biens, they frequently answered, when interrogated, that they knew nothing about the matter, and that their husbands had acted for them. The Legislature has not conferred the right to examine the husband, under such circumstances, upon any but the adverse party. Application rejected. (17 J., p. 140)

S. W. DORMAN, for plaintiff. A. & W. ROBERTSON, for defendants.

ARBITRAGE .- ARBITRE.

COUR DE CIRCUIT, Saint-Hyacinthe, 27 février 1873.

Coram Sicotte, J.

MAYNARD vs MARIN.

Jugé:—Qu'un arbitre ne peut réclamer ses honoraires, comme tel arbitre, de la partie qui l'a choisie, s'il n'a pas fait son rapport dans les délais mentionnés dans le compromis, et s'il n'a pas prononcé et signifié aux parties la sentence arbitrale, et cela quand même cette partie aurait, lors du compromis, promis verbalement lui payer tant par jour, pour tout le temps qu'il agirait ainsi comme tel arbitre.

Action déboutée. (17 J., p. 140) Bourgeois, Bachand & Richer, avocats du demandeur. Chagnon & Sicotte, avocats du défendeur.

SALE OF DEBTS.

COURT OF QUEEN'S BENCH, Montreal, 23rd June, 1873.

Coram Duval, C. J., Drummond, J., Badgley, J., Monk, J., AND TASCHEREAU, J.

THE CITY BANK OF MONTREAL, Plaintiffs in Court below, Appellants, and Thomas White et al., Defendants in Court below, Respondents.

Held:—1° That a memorandum sous seing prive by which a Printing Corporation authorized W (its president) to collect a debt due to the Corporation, the memorandum stating that such account had been

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transferred to him for value received, could not be considered a transfer to a banking Corporation of which W. was also President, though the course of dealing indicated that such was the intention of the parties.

the parties.
27 That even if such memorandum could be considered a transfer to the Banking Corporation, the latter not having used dilligence to collect the debt, and there having been no signification upon the debtor, had no claim against a subsequent transferee buying in ignorance of such alleged previous transfer, by notarial deed duly signified, and acted upon by the debtor by payment of the debt to such subsequent transferee.

The action was for the recovery of the sum of \$566.67, amount of a debt due to the Montreal Printing and Publishing Company, by the Grand Trunk Railway Company, which plaintiffs alleged had been transferred to them, and which they said defendants had wrongfully collected and retained. The pretension of defendants was that the document on which appellants relied was not a transfer, nor even an order in their favor; that, such as it was, it was never accepted, or notified to the Grand Trunk Railway Company; that defendants became proprietors of the debt, by a valid title duly signified to the Grand Trunk Railway Company and collected and received the money, before they had any intimation of any claim by the Bank upon it. The defendants said, moreover, that the paper referred to was unauthorized and informal; that no right of action could possibly arise against them for the money, as they received it in good faith, from the Grand Trunk Railway Company, as being transferred to them by the Montreal Printing and Publishing Company; and that any recourse plaintiffs might have had should have been waged against the Montreal Publishing Company, or the Grand Trunk Railway Company, and not against them. The declaration states that, on the 10th of May, 1870, the Montreal Printing and Publishing Company transferred and made over to plaintiffs, accepting thereof, to wit, to William Workman, president of the City Bank, and its duly authorized agent in that behalf, a debt or sum of \$566.67, being an amount then due to the Montreal Printing and Publishing Company, by the Grand Trunk Railway Company, for printing, for the four weeks ending 7th day of May, 1870; that the transfer was made by written instrument, then and there executed, and delivered by the Publishing Company, acting by their authorized agent William Moriarty, their then acting secretary and treasurer, in the usual manner and course of business dealing, between the Bank and the Publishing Company, in relation to accounts due for printing to the last Company, by the Grand Trunk Railway; and that William Workman, though appa-

rently plaint betwe value, Comp these right : 1870, (on the Publish debts a \$30,000 undersi whatev the rigi only in by the reclama account or for consente against that, by effect, bo any deb selves cla would gi ing and transfer, question ; without collection among of they must debt for p it and int th t plain remedy ag said debt, pany a cor the date sufficiently is insolve allowed to at the expe declaration

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rently acting in his own name, in fact, acted on behalf of plaintiffs, as was well known and understood at the time between the parties; that the said transfer was made for value, then and there, given by plaintiffs to the Publishing Company, in cash, credits and advances; that, by means of these facts, the Publishing Company were divested of all right and title to the debt; that, on the 7th day of October, 1870, the Publishing Company, by notarial transfer, passed on that day, transferred to defendants, all the rights the Publishing Company then had in their outstanding bookdebts and accounts, amounting in all to the nominal sum of \$30,000; it being, by the transfer, expressly agreed and understood that the same was made without any warranty whatever; and, also, that defendants purchased and acquired the rights of the Montreal Publishing and Printing Company only in such debts and accounts; that it was also agreed, by the said transfer, that defendants should not make any reclamation whatsoever upon the Publishing Company, on account of money received by the Company, or otherwise; or for any cause or pretext whatsoever; and defendants consented and agreed, by said transfer, to allow contra claims against individual creditors of said Publishing Company; and that, by the said transfer, defendants generally, in fact and effect, bound themselves not to claim, or demand, or collect, any debt which the Publishing Company could not themselves claim or collect; or the making or collecting of which would give rise to a reclamation against the Montreal Printing and Publishing Company, and that, by means of the said transfer, defendants acquired no right to the debt in question; that, immediately after the date of the transfer, without the knowledge of plaintiffs, defendants assumed the collection of the debts of the Publishing Company; and, among others, collected the said sum of \$566.67; and that they must be held, in law and equity, to have collected the debt for plaintiffs, and were bound to account to plaintiffs for it and interest; all which the defendants have refused to do; th t plaintiffs, owing to insufficient signification, were without remedy against the Grand Trunk Railway Company, for the said debt, although they had delivered to the Railway Company a copy of the Publishing Company account, long before the date of the transfer, and believed that they had sufficiently signified it thereby; that the Publishing Company is insolvent, without assets; and that, if defendants be allowed to retain the said sum they will be unjustly benefited at the expense of plaintiffs. The document referred to in this declaration is as follows: "Office of the M. P. & P. Co., Montreal, May 10th, 1870. Wm. Workman president of the Mon"treal Printing and Publishing Company, is hereby authoriz-" ed to collect from the Grand Trunk Railway Company the " account of the M. P. & P. Co., for printing, for the four weeks " ended May 7th, 1870, amount five hundred and sixty-six 67-" 100 dollars, the said account having been transferred to him " for value received. Wm. Moriarty, Act. Sec. & Treasurer." To this action, defendants pleaded that it was not true that the Publishing Company ever transferred the said debt to plaintiffs; that the written instrument produced and fyled by plaintiffs, in support of their action, is not and does not purport to be a transfer of the debt, nor does it purport to be accepted by Workman as president of the City Bank; that, in fact, no transfer of the debt was ever authorized by the Company to be made to the City Bank or to Workman in any capacity whatever; that Moriarty, who signed the instrument, as Acting-Secretary and Treasurer, was not such Acting Secretary or Treasurer at the time, and was not authorized to sign said instrument; that, in fact, at the time of the execution of it, the Company had divested itself of all its plant and stock, and had placed the collection of the debts due to it under the control of Sir Hugh Allan, and that no one in connection with the said Company, except Sir Hugh Allan, was competent to authorize the execution of that instrument: that the terms and conditions of the notarial transfer, by the Company to defendants, which are set forth in plaintiffs' declaration, were agreed upon, between the parties thereto, for their mutual protection, in the event of any erroneous charge, or credit, made in the Books of the Publishing Company, their accounts having been to some extent irregularly kept, and defendants being desirous that the sale and transfer effected by the deed should be final and that no question of adjustment of accounts should afterwards be permitted to arise between them; that, at the time of the execution, by the Company, of the notarial transfer of its assets to defendants, the pretended transfer had never been presented to the Grand Trunk Railway Company; nor had that company ever been notified of, or signified of any transfer, and that the Publishing Company were entitled at the time of the transfer by them to defendants, to recover the amount, and had never divested themselves of the right to recover the amount, nor had the debt become vested in plaintiffs in any way, and that defendants, upon the execution of the transfer to them, duly notified the same to the Grand Trunk Railway, and were subsequently paid by that Company the amount due; that the conditions of the transfer were agreed upon by the parties, only after full enquiry into the state of the

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Mack Montrea real. It It requir its Pres practice against t man, and amounts William Printing equivaler the Prin as is usua transferr City Bar used to considere the mome to receive considere City Bank money fr importance Trunk. B the City Printing repaid to accounts of the Publishing Company, in view of which conditions, defendants had taken extraordinary pains to ascertain how much of the apparent debts might be considered to be really due to the Publishing Company, and had ascertained that a large number of errors had existed in the accounts of the Company; some in favor of them, and some against them; and, amongst others, had ascertained that the amount due by the Grand Trunk Railway Company was the amount that they subsequently collected from the Company, and that, without investigation and information, defendants would never have purchased the said debts, at the price fixed in the said deed, and that, if plaintiffs were ever entitled to obtain a transfer of the debt, which defendants expressly deny, they lost the opportunity of obtaining and completing such transfer, by their own negligence and laches, and cannot recover the same from respondents. The Superior Court, at Montreal, MACKAY, J., on the 30th day of April, 1872, rendered judgment as follows:

MACKAY, J.: Up to May, 1870, a Corporation called the Montreal Printing and Publishing Company existed at Montreal. It printed for the Grand Trunk Company and others. It required money from time to time, and William Workman, its President, being President of the City Bank also, the practice was, after sending out accounts, as, for instance, against the Grand Trunk, to transfer them to William Workman, and give him written orders, or authority, to draw the amounts from the debtors. Possessed of this authority, William Workman would get placed to the credit of the Printing and Publishing Company at the City Bank, money equivalent to the sums of the orders, less the discount, and the Printing and Publishing Company used to cheque it out, as is usually done. Lowe explains the system. He says: We transferred our accounts against the Grand Trunk to the City Bank by this mode, and the Bank got paid, and we used to be informed of the fact, from time to time. We considered the accounts the property of the City Bank, from the moment of the transfers. We considered we had no right to receive payment of them afterwards, and never did. We considered the transactions to be sales, out and out, to the City Bank. Workman says that, though he used to get the money from the Grand Trunk, that was a matter of no importance; it was really the Bank receiving from the Grand Trunk. Be this as it may, it is certain that, before May, 1870, the City Bank had, several times, advanced moneys so to the Printing and Publishing Company, which moneys were repaid to the Bank, when the Printing and Publishing

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them, llway, nount on by f the Company's debtors (the Grand Trunk for instance) paid afterwards. On the 10th of May, 1870, Workman got from the Printing and Publishing Company the paper writing, (printed above). Upon receipt of it, he ordered to be placed to the credit of the Printing and Publishing Company, at the City Bank, an equivalent sum. The Bank has given full value for this receipt, which is (it says) to read in its favor, as if Workman, in the receipt, had not been styled president of the Printing and Publishing Company, but of the City Bank. Early, in May, 1870, the account of the Printing and Publishing Company for the \$566.67 had been sent in to the Grand Trunk Railway Company, by the Printing and Publishing Company. But no exhibition was or has been made to the Grand Trunk Railway Company of this receipt, or authorization, of May 10th, at any time. On the 11th of July, says Wallis, the account was passed for payment by the Grand Trunk Railway Company. From that time, till October, a signed cheque lay, for the amount, in the Grand Trunk Railway office, to the order of the Printing and Publishing Company, but was not communicated to anybody. On the 7th of October, 1870, defendants, by notarial transfer, obtained a transfer of all debts due to the Printing and Publishing Company, by any of its debtors. This, in consideration of \$8,300. The Grand Trunk Railway Company, afterwards, had knowledge, evidently, for they took counsel, though I do not see signification of the transfer proved upon this record, by notarial certificate, as usually. On the 11th of October, the cheque before referred to was changed and made payable to the order of defendants, and paid to them. Previously to getting the money, defendant had asked from the Grand Trunk Railway Company what was due to the Montreal Printing and Publishing Company, but not specifying any sum as demanded, or items of account.

Says Wallis: The amount of the account sent in, in May, had never been asked from the Grand Trunk Railway Company, till defendants claimed it. The defendants got several cheques from the Grand Trunk Railway Company, at the same time, upon merely asking for what was due to the Montreal Printing and Publishing Company. Richard White swears that he had no knowledge that any part of what he got was claimed by the City Bank, or any person, till several weeks afterwards. Fraud is not even charged against defendants; and, though one of the defendants, after the notarial transfer, found out that the Grand Trunk Railway Company account would be some \$500 more than previous informations and lists made to appear, I cannot pronounce against him as prayed; for he did not know of the

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City Bank claim, or of Workman's paper, and, afterwards, got his money from the Grand Trunk Railway Company not unfairly. The plaintiffs, by their declaration, take special ground against defendants, for instance, they contend that, after making the plaintiffs' Exhibit No. One, the Printing and Publishing Company became and were divested of all right or title or claim to or upon the debt or sum of \$566,67, and, particularly so, after receipt by the Printing and Publishing Company, from plaintiffs, of the equivalent sum, or condition; that so, the Printing and Publishing Company could not, by the later notarial transfer, prejudice the rights of plaintiffs, and that the notarial transfer really only meant to give such rights to defendants as the Printing and Publishing Company had, and that it had none at that time to this \$566.67, having executed for the benefit of plaintiffs the Exhibit No. One. The plaintiffs further contend that defendants were bound also to allow all contra claims against any accounts transferred, and so are bound to allow plaintiffs' claim, &c. The defendants deny these pretensions of plaintiffs, and say that the order or authorization, plaintiffs' Exhibit No. One, is an absolute nullity, ultra vires of Moriarty, who signed it, and that Workman, as President of the Printing and Publishing Company, could not take from it as per signed paper. We need not say more about this. The plaintiffs, to support their argument, to the effect that the Printing and Publishing Company became, by Exhibit No. One, completely divested of their créance against the Grand Trunk Railway Company, cite LaRombière and Demolombe who go far, but treating more the question of right of property as between two different purchasers of one object, corporal, from the same seller. They hold that, if A sell to B, a chair, or table, and no actual deplacement be, and A subsequently sells to C the same chair, or table, C can get no title, nor property, though A may deliver to him; for A can give him no more rights than he himself had, and he had none, having previously sold them, though without deplacement, to B. They go to the extent of holding that, after such a sale to B by A, the creditors of the latter could not, and cannot seize the chair or table referred to super A, because of its being B's. If fraud be, let them resort to an appropriate action direct, say these authors, fraud is not to be presumed, &c. Those authors are contradicted by a dozen others, and cannot make law against our own, coupled with our jurisprudence. Moreover, the question is here upon a transfer of a créance, whether an earlier cessionnaire by acte sous seing privé, unsignified, is to go before a later one, by notarial act signified, cr, what is the same thing, noticed and acted upon, and, upon this point, our law and jurisprudence are clear and invariable. Even had the Whites had knowledge of the May order to Workman, they could legally take payment from the Grand Trunk Railway Company, under the notarial cession of October. Certainly so, in the absence of fraud, and none is even alleged. See p. 327, Mar-

cadé, and No. 2 and 3, p. 328.

The judgment is as follows: "The Court, considering that the sum of \$566.67 sought to be recovered by plaintiffs, was received by defendants from the Grand Trunk Railway Company, in their, (defendants') right, under the notarial transfer to them of seventh October, 1870; that said money was paid by the Grand Trunk Railway Company, in payment of an amount previously due to the Montreal Printing and Publishing Company, as per an account rendered in May, 1870, for printing, after the rendering of which account the said amount had never been claimed from the Grand Trunk Railway Company, till defendants got it paid to them, in October, under and by virtue of the notarial transfer aforesaid, previously to the time of which payment the Grand Trunk Railway Company had no kind of notification of, and defendants had no knowledge of the paper, plaintiffs' exhibit No. One, or of the alleged cession by the Montreal Printing and Publishing Company to Workman, or to plaintiffs, of said \$566.67; Considering that the Montreal Printing and Publishing Company had not, by said paper, plaintiffs' exhibit No. One, divested themselves of the said créance against the Grand Trunk Railway Company, so that they might not, at date seventh October, 1870, transfer the said créance, \$566.67 to defendants so that the Grand Trunk Railway Company could validly pay it to defendants, and that defendants doing the diligence they did (the said Wm. Workman) and plaintiffs doing none, might and can hold the said \$566.67, gotten from said Grand Trunk Railway Company; Considering that fraul is not alleged against defendants, and that defendants, cessionaires, by aforesaid transfer notarial, of the créance that once belonged to the Montreal Printing and Publishing Company, against the Grand Trunk Railway Company, got paid the said \$566.67. before the Grand Trunk Railway Company had notice of the plaintiffs' exhil : No. One, and that defendants, by law, are entitled to keep what they had gotten, and are not bound to account for it, or for anything in respect of it, even, supposing plaintiffs to be in the right of Workman, president of the Montreal Printing and Publishing Company, and that that exhibit was or is a transfer valid to Workman, president of the Montreal Printing and Publishing Company of the amount referred to in it; Considering that nothing, subrogation notarial from ma finally, t indebted plaintiff

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gation clause or anything else, stipulated in and by said notarial transfer of seventh October, can prevent defendants from maintaining their defence against plaintiffs; Considering, finally, that plaintiffs had failed to prove that defendants are indebted to or liable towards them as alleged, doth dismiss

plaintiffs' action."

Monk, J., dissented from the majority of the Court, on questions of fact. His Honor considered that the transfer to the City Bank, from the Printing and Publishing Company, though of the most informal nature, it was possible to imagine, was, nevertheless, good and valid; and respondents, by their subsequent purchase of the debts en bloc, acquired no right whatever to the particular sum so transferred to the City Bank. In receiving this sum, from the Grand Trunk Company, though in good faith, they were receiving money belonging to the City Bank, and were bound to account for it.

BADGLEY, J.: The matters of fact upon which the action is founded are simple and few. It seems that Workman was president of the Printing Company, and from the course of business between that Company and the Grand Trunk Railway Company, the printing account, for work done by them, for the Grand Trunk, was made up monthly, and sent in to the Grand Trunk, and, for each account, an order was officially made by the Company in favor of their president, Workman, as such, to receive the amount of the account. Several of these orders, with the corresponding official receipts of the president upon them, are filed of record, which, so far, only show that monthly settlements and payments were made by the Grand Trunk, with the Printing Company, acting by its authorized president. This was plainly a matter between the debtor and the creditor alone, and, in itself, shows no connection between appellant and the Grand Trunk, who paid to the person authorized to receive the amount, and who had, therefore, no concern or interest in the manner in which the receiver applied it. Moreover, these orders were not transfers beyond the Companyself; they were mere authorities to their chief recognized officer, as such president, to receive the debt, without any authority to transfer it beyond himself, by order to that effect. Up to this stage of the proceedings, there is nothing to connect respondents with the matter. But it seems that the Printing Company had an account at the City Bank, of which institution Workman was also president, as well as of the Printing Company, and his practice was to have these orders deposited to the credit of the Printing Company, and to have the amount collected from the Grand Trunk Company. Even, in this Bank account, there is

nothing to connect either the Grand Trunk or respondents with it, so that the banking connection between appellant and any of the parties mentioned must be limited especially to the Printing Company alone. The Grand Trunk, in the course of their business with respondents, paid their debt to respondents, authorized to receive it when presented. and that was the extent of their privity, whilst, as between respondents and appellants, there was no privity whatever. The appellants were unknown to respondents, who collected the debt transferred to them, and which was not excepted out of the general mass of debts transferred under the deed of purchase, and who, under the deed of sale by the Company, of which Workmin was president, were therefore entitled to receive it, no steps having been taken by Workman or appellants to have it secured for or paid by the Grand Trunk, either to the President of the Company, or to appellants, who could have no direct claim on respondents, under the order and no authority to receive it. All the other receipts and orders shewing the President of the Company alone to be authorized and actually receiving as by his official receipts, his deposit in the Bank of the amount received, did not make the Bank a privy to the debt as between the Grand Trunk and the Company, and could not affect respondents. Of the two alleged claimants, appellants, had a merely inchoate right which could only be perfected by payment, whilst respondents, under an absolute right over the unpaid and unclaimed debt transferred to them, used due diligence, and, therefore, have a right to be protected. The appellants have shown no legal obligation by respondents to repay the amount claimed of them, and the judgment should be confirmed. Judgment confirmed. (17 $J_{\cdot \cdot}$ p. 141, et 335)

TRENHOLME & McLAREN, for the appellants.

ABBOTT, TAIT & WOTHERSPOON, for the respondents.

MEDECIN.-PREUVE.-PRESCRIPTION.

Cour de Circuit, Montréal, 10 mars 1873.

Coram TORRANCE, J.

BARCELO vs LEBEAU.

Jugé:—10. Que, d'après l'art. 2260 du Code Civil, tel qu'amendé par l'Acte provincial 32 Vic., ch. 32, le médecin est cru à son serment, quant à la nature et la durée des soins, pour tout ce qu'il réclame en justice, et qui n'est pas prescrit.

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J. G. D'. que la pre cin, n'est manière p de prouve telle que c qui jure s est dispens soins donne évidemmen du contrais donné des moins pern plus au der par un au c'est qu'il e 20. Que la loi telle que conque dispense le médecin de prouver la réquisition de ses services; il lui suffit d'en prouver lui-même la nature et la durée, et d'en justifier la valeur par un autre médecin.

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30. Que, partant, il y a en sa faveur présomption que, s'il a donné des soins, c'est qu'il en a été requis, ou qu'on a permis ou souffert qu'il

Le demandeur, qui est médecin, a réclamé par son action, le prix des soins par lui donnés au défendeur et à sa famille, depuis le 14 février 1867 jusqu'au 4 juillet 1870. Le défendeur a plaidé que le compte du demandeur, moins le dernier item (\$1.25), était prescrit lors de l'institution de l'action; quant au dernier item, il s'est contenté de le nier. Le demandeur a répondu spécialement que le défendeur ne pouvait invoquer la prescription, parce qu'il y a eu continuation de services et reconnaissance de la dette réclamée: ce qu'il a en vain essayé de prouver par le défendeur. Il ne restait donc plus au demandeur, pour éviter le rejet de son action, qu'à prouver le dernier item de son compte, le seul qui ne fut pas encore prescrit. Il fut assermenté comme témoin, prouva la nature et la durée des soins en question, et ajouta qu'il avait été requis de les donner par le défendeur lui-même. Quant à la valeur, le défendeur déclara Cour tenaute, n'en pas exiger d'autre preuve.

J. DUHAMEL, pour le défendeur, prétend que la preuve offerte par le demandeur est insuffisante et illégale. La loi ne lui permet de prouver la nature et la durée de ses soins, que lorsqu'ils ont été requis. Dans le cas actuel, le demandeur n'a prouvé aucune réquisition, et le défendeur vient de jurer qu'il n'a jamais requis les services en question, et que le demandeur n'a donné aucun soin dans sa famille depuis le 14 février 1867.

J. G. D'AMOUR, pour le demandeur, soutient, au contraire, que la preuve de la réquisition des soins donnés par un médecin, n'est pas nécessaire; la loi a réglé la question d'une manière péremptoire, en décrétant que le médecin a le droit de prouver la nature et la durée de ses services. Si la loi, telle que conçue, signifie quelque chose, c'est que le médecin, qui jure avoir rendu des services de telle ou telle nature, est dispensé de prouver qu'il en a été requis; la preuve des soins donnés, et de la nature et durée de ces soins, comporte évidemment celle de la réquisition; car il y n. jusqu'à preuve du contraire, présomption en faveur du médecin, que, s'il a donné des soins, c'est qu'il en a été requis, ou qu'on a au moins permis, ou souffert, qu'il en donnât. Il ne restait donc plus au demandeur qu'à prouver la valeur de ses services, par un autre médecin, et, s'il n'a pas fait cette preuve, c'est qu'il en a été dispensé par la partie adverse.

La Cour a donné raison au demandeur, et condamne le défendeur à lui payer \$1.25 (1). (17 J., p. 157)
D'AMOUR et BERTRAND, pour le demandeur.
DUHAMEL, RAINVILLE et RINFRET, pour le défendeur.

CAPIAS.

COURT OF REVIEW, Montreal, 30th December, 1872.

Coram Johnson, J., Torrance, J., Beaudry, J.

MILLIGAN vs MASON.

Held:—10 That, in an affidavit for capias, on the ground of intention to depart, though the omission to disclose the names of deponent's informants, as to his grounds of belief, would be fatal, if his belief rested on information only, yet, the affidavit is good, if deponent swears directly to another of his grounds of belief, which is in itself sufficient.

2º That it is sufficient that deponent, as one of his grounds, swears directly that defendant is master of a ship, and that said ship is cleared at Custom House, though, without saying that this is done by defendant, or that he is going with her, or naming the destination.

30 That, in the circumstances, plaintiff was not limited to the remedy by revendication, but was entitled to capias.

by revendication, but was cultified to capias.

4º That, though, since the Confederation, there has been no "Province of Canada," when such affidavit states that defendant is leaving "the Province of Canada," it is sufficient, and the Court will understand that thereby "the heretofore Province of Canada" is meant.

This was a petition to quash a capias, on ground of insufficiency of the affidavit. The plaintiff's affidavit stated that Wm. E. Mason, at present, in the city and district of Montreal, captain of the ship "Eliza Alice" now in this port of Montreal, is personnally indebted to this deponent, in a sum of \$80, being as and for the price and value of 400 new bags, &c.; that said Mason obtained possession of said bags, by false pretences; that the same had been, by plaintiff (deponent), hired to another party than said Mason, and that the same were, by deponent, sent by his carters, for delivery, to this other person, the captain of the ship "Grafwedel," also in the port of Montreal; that Mason, by falsely pretending, to deponent's said carters, that said bags were to be delivered to him, and that he was the party to whom said carters had been instructed to deliver said bags, deceitfully persuaded said carters to deliver to him said bags, and doth now refuse to deliver the same to deponent, owner thereof; that this

deponen defenda Canadaand tha recourse of depon province loaded, a have be informed officers, i leave the has no do within th benefit, d under it, dant petit this writ, doth not to the pro that defe beyond w disclose th exactness, intention and suit. and defend The trans Ships saili portion of the shifting hire, from a certain h from one p lying near (defendant (plaintiff's " Grafwed and stowed tements of capias. R. that plaint

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⁽¹⁾ Un jugement en ce sens fut rendu, le 15 octobre 1869, dans la cause de White vs DeBonald, Torrance, J., 14 L. C. J., p. 133; 20 R. J. R. Q., p. 39 et 550.

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ause de R. Q., deponent hath reason to believe, and doth verily believe, that defendant is about, immediately, to leave the Province of Canada, with intent to defraud his creditors and plaintiff. and that departure will deprive plaintiff (deponent) of his recourse against defendant; that the grounds of the belief of deponent that defendant is about immediately to leave this province, re as follows: that his, defendant's vessel, is already loaded, and cleared at the Custom House, that is, her papers have been passed there. And deponent has been credibly informed, to wit, by several parties, and by Custom House officers, in this city, that defendant is about immediately to leave the port of Montreal and this province; that defendant has no domicile in this province; that said debt was created within this district, and in this province; that without the benefit, &c." Upon this affidavit, capias was issued, and, under it, defendant was arrested on 11th Oct., 1872. Defendant petitioned Mr Justice Berthelor, in chambers, to quash this writ, on the following grounds: 1. Because said affidavit doth not disclose any cause of action, which entitles plaintiff to the proceeding by capias; 2. Because it doth not establish that defendant was about to leave the limits, intention to go beyond which might give this remedy; 3. Because it doth not disclose the reasons of belief, or the sources of information with exactness, but the same are vague, and do not establish such intention in defendant to depart, as to justify this proceeding and suit. On 31st Oct., 1872, His Honor rejected this petition. and defendant inscribed the case for revision of this judgment. The transaction out of which the matter arose was as follows: Ships sailing, from this port to Britain, are bound to carry a portion of their grain cargoes stowed in sacks, which prevents the shifting of the loose grain. For this purpose, the masters hire, from parties in Montreal, sacks to stow such grain, for a certain hire for the voyage. Defendant had hired his sacks from one party, and plaintiff was supplying the "Grafwedel" lying near defendant's vessel. By plaintiff's own mistake (defendant says in his plea), by defendant's misrepresentation (plaintiff's affidavit says), a load of bags intended for the "Grafwedel" was delivered to defendant's ship "Eliza Alice." and stowed in her hold, with grain. Plaintiff, under the statements of his affidavit, contends that he has remedy by RAMSAY (R. A.), for defendant: Defendant submits that plaintiff's affidavit does not disclose any cause of action. which entitles him to capias, and contends that the proper and only remedy was revendication, and that capies would only be warranted by the allegation that defendant had secreted or converted the bags, and, thereby, rendered revendication impossible. Vide Dumaine vs Guillemot, 6 L. C. R. p. 477; 14 R. J. R. Q., p. 313. It was held that the action should have been revendication of the horse, and damages for detention, and that no capias lay. That no personal debt was created by the refusal. Also Allen vs Allen, 6 L. C. R., p. 478; 14 R. J. R. Q., p. 313. Plaintiff's action should have been for a deed. In Royal Insurance Co. vs Knapp, 11 L. C. J., p. 1; 16 R. J. R. Q., p. 400, cited below by plaintiff, the affidavit stated the secretion of bonds &c., whereby plaintiff was prevented from revendication (1). No intention to leave the required limits is disclosed. Affidavit states, 1st, "Province of Canada," and 2nd, in two places further on "this Province," viz. Quebec. Where is the "Province of Canada" now? and where are its limits? The sources of information and reasons are vague, no informant's name given; this is necessary. Perrault vs Deseve, 2 R. J. R. Q., p. 344. Cornell vs Merrill, 1 L. C. R., p. 357; 3 R. J. R. Q., p. 38, vide Judge DAY's remarks. Comeron vs Brego 10 J. C. J., p. 88; 16 R. J. R. Q., p. 403 (2). Unless defende and all the stated to have given

(1) Le ch. 87 des S. R. B. C. de 1861, intitulé: "Acte concernant l'arrestation et l'emprisonnement pour dettes ainsi que le soulagement des débiteurs insolvables," décrétait sec. 8 mat : "Ja cour ou tout juge de la cour d'où a émané l'ordre d'arrêter une personne, parra : it en terme ou en vacance, ordonner que cette personne soit remise en liberté, s'il est démontré par une requête sommaire et des preuves satisfaisantes, que le défendeur est un prêtre ou ministre d'une dénomination religieuse quelconque, ou qu'il est âgé de soixante-dix ans ou plus, ou est une personne du sexe, ou que la cause d'action a originé dans un pays étranger, ou ne se monte pas à quarante piastres, monnaie légale de cette province, ou qu'il n'y avait pas de raison suffisante pour croire que le défendeur était immédiatement sur le point de laisser la province avec intention frauduleuse, lorsque ce motif aura été assigné à l'arrestation, ou que le défendeur n'a pas caché et n'était pas sur le point de cacher ses biens et effets avec cette intention, lorsque ce motif aura été assigué à l'arrestation." Aux termes de cette section, le capias ad respondendum, décerné contre des individus pour le recouvrement de bons du gouvernement des Etats-Unis, qu'ils avaient volés à New-York et qu'ils détenaient en leur possession à Montréal où ils s'étaient réfugiés après leur vol, sera cassé par le motif que la cause d'action a pris naissance dans un pays étranger, le vol ayant eu lieu et la détention frauduleuse des objets volés, affirmée par l'affidavit au soutien du capias, ayant eu son origine à New-York, en pays étranger. (Royal Insurance Co. vs. Knapp et al., C. S., en Chambre, Montréal, 26 février 1867. Monk, J., 11 J., p. 1; 2 L. C. L. J., pp. 189, 201, 219, et 16 R. J. R. Q., p. 400.)

(2) On doit, dans un affidavit pour capias ad respondendum, donner le nom des personnes dont on a obtenu l'information que le défendeur était sur le point de quitter la province, à moins que les autres circonstances mentionnées ne justifient cette croyance. (Perrault vs Désère, C. S., Montréal, 20 février 1854, DAY, J., SMITH, J., et C. MONDELET, J., P. D. T. M., p. 19, et 2 R. J. R. Q., p. 344.)

L'allegué, dans un affidavit pour capias ad respondendum, que "le déposant "a été informé d'une manière croyable que le défendeur a secrètement enlevé "ses effets de sa demeure pendant la nuit, avec l'intention de quitter la provivince et dans le but de frauder le déposant et ses créanciers en général, n'est pas suffisant pour permettre l'émission d'un bref de capias ad respondendum, si le déposant n'a pas donné le nom de la personne qui l'a informé de ce fait. (Cornell vs Merrill, C. S., Montréal, 10 juin 1851, Day, J., Smith, J., 1 D. T. B. C., p. 357, et R. J. R. Q., p. 38.)

the inf ship is her, th C. R., p p. 51, a capias 2 R. J. judgme for plain of the (the peti from wl disclosed J., p. 22 Reports. rance Co 11 L. C raised by Court, M (not rep vince of intention 3. As to 1 of belief tain, has his ship b for an in selves hav ed him t leave Car sufficient

L'allégué, "sant a été
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(3) L'affida somme de £ transportées tion du trans respondendum alléguer tout dans toute pr de ce transpol., SMITH, J.

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the information. Affidavit does not state to what place the ship is cleared: Does not state that defendant is going with her, this is usual and necessary. Vide Wilson vs Reid, 4 L. C. R., p. 157; 12 R. J. R. Q., p. 16, and other cases cited. RAMSAY, p. 51, all the affidavits state this fact. In these affidavits for capias nothing must be left to inference. Nye vs MacAlister, 2 R. J. R. Q., p. 347 (3). Defendant therefore prays for the judgment referred to, and that the capies be quashed. BUTLER, for plaintiff; the affidavit is in perfect accordance with Art. 798 of the Code of Procedure. 1. With regard to the first moven of the petition, plaintiff begs to refer to the following cases, from which it is to be gathered that, under the circumstances disclosed, capias is competent, Redpath vs Giddings, 9 L. C. J., p. 225; 16 R. J. R. Q., p. 403; Hassett vs Mulcahey, 6 L. C. Reports, p. 15; 21 R. J. R. Q., pp. 500 and 524; Royal Insurance Co. vs Knapp & Griffin, 2 L. C. Law Journal, p. 189; 11 L. C. J., p. 1; 16 R. J. R. Q., p. 400. 2. The question raised by the 2nd moyen was decided in re no 2190, Superior Court, Montreal, L'Ainé vs Clarke in Review, 3 R. L., p. 450, (not reported yet) where it was held that the words "Province of Canada" were a sufficient description of limits, the intention to go beyond which gave rise to this proceeding. 3. As to the 3rd moyen the affidavit is sufficient. As reasons of belief the plaintiff alleges that the defendant, a ship captain, has taken his clearance papers at the Custom House, that his ship has cleared the customs (a proceeding not necessary for an inland vessel), and that the officers of customs themselves have furnished him with this information, and informed him that defendant is immediately about to sail and to leave Canada; surely sufficient reasons for his belief and a sufficient averment of his source of information.

L'allégné, dans un affidavit pour capias ad respondendum, que "le dépo"sant a été informé par deux personnes dignes de foi que le défendeur était
"sur le point de quitter la province, etc.", n'est pas suffisant pour permettre
l'emission d'un bref de capias ad respondendum, si le déposant n'a divulgué le
nom des deux personnes qui lui ont fourni cette information. (Cameron vs
Brega, C. S., Montréal, 25 septembre 1865, BERTHELOT, J., 10 J., p. 88; 1 L.
C. L. J., p. 65, et 15 R. J. R. Q., p. 351.)

(3) L'affidavit dans lequel le déposant allègue que le défendeur lui doit la somme de £10, montant de deux obligations consenties par le défendeur et transportées plus tard au déposant, sans alléguer en même temps la signification du transport, est insuffisant pour permettre l'émission d'un capias ad respondendum, par le motif que, dans un affidavit pour un tel bref, il faut alléguer tout ce qui est nécessaire pour donner droit à cette procédure, et que st niccessaire pour donner droit à cette procédure, et que st niccessaire pour donner droit à cette procédure, et que de ce transport. (Nye vs Macalister, C. S., Montréal, 23 février 1854, Day, J., SMITH, J., et C. MONDELET, J., P. D. T. M., p. 27, et 2 R. J. R. Q., p. 347.

TOME XXIII.

On 31st Dec., 1872, the Court of Review rendered judgment, confirming that of Mr Justice BERTHELOT, and rejected the

petition.

JOHNSON, J.: By some error, as it is alleged, a number of sacks were given to defendant, a ship captain, by error, and he was capiased as he was about to sail. The only question at present is as to the sufficiency of the affidavit. It is impugned because the names of the persons giving the information to the deponent are not disclosed. This would be a fatal omission, if such information were the only ground for deponent's belief. But there are other grounds stated in the affidavit. One is that the defendant had done everything that was necessary to clear his ship and was ready to sail. As a matter of common sense, therefore the creditor was not bound to wait until his debtor had actually sailed in order to be sure he was going away. We find that the deponent had sufficient grounds for his belief, apart from the information received from the persons whose names are not disclosed. As to the objection relative to words "Province of Canada," it has already been held sufficient, and we have a right to give the words their reasonable meaning of the heretofore "Province of Canada." Further, we hold that, if the circumstances under which the bags are in defendant's possession, be as stated in the affidavit, plaintiff is entitled to his capias, and not limited to revendication only. We, therefore, confirm the judgment a quo, rejecting the petition to quash. (17 J_{\cdot} , p. 159)

MONK & BUTLER, for plaintiff. R. A. RAMSAY, for defendant.

OPPOSITION TO JUDGMENT.

COURT OF QUEEN'S BENCH, Montreal, 20th June, 1874.

Coram Taschereau, J., Ramsay, J., Sanborn, J., Loranger, A. J.

JUBINVILLE et al., Defendants in Court below, Appellants, and THE BANK OF BRITISH NORTH AMERICA, Plaintiff in Court below, Respondent.

Held:—That an opposition à jugement filed by defendants, under Art. 484 of the Code of C. P., on the sole ground that one of them has been summoned by a wrong name, is in the nature of a preliminary exception to the action, and must, consequently, be accompanied by the deposit required by Art. 112 of the Code of C. P., in addition to that required by Art. 486 of the same Code.

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This was an appeal from a judgment rendered by the S. C., at Montreal, MACKAY, J., on the 22nd April, 1873, granting a motion of plaintiff that the paper writing fyled by opposants, on the third of that month, and intituled "Opposition d jugement et affidavit," be rejected from the record, with costs, for the reasons therein stated. The facts may be stated as follows: In the month of Febuary, 1873, plaintiff took out an action against the commercial firm of JUBINVILLE & LECLERC, of Pointe Claire, for the sum of \$776.74, the amount of their promissory note in favour of James Austin & Co., which had been endorsed over by the latter firm to plaintiff. The writ was served on P. Jubinville, (one of the members of the firm, and one of the opposants) in person, at the place of business of the firm. The defendants failed to appear, and, on the 10th of March, judgment was rendered against them, according to the conclusions of plaintiff's declaration. On the 1st of April, plaintiff sued out a writ of execution against the goods and chattels of defendants, and, on the 3rd of April, the opposants fyled in the office of the Prothonotary of the Superior Court a paper writing intituled "Opposition d jugement et affidavit," alleging therein that opposants are copartners, carrying on trade under the name or firm of Jubinbinville & Leclerc, at Pointe Claire; that the writ of summons was served at their place of business, in Pointe Claire; that Leclerc is erroneously called "Pierre Leclerc" in the writ and declaration, whereas his true name, and the name he has always been known by is "Moïse Leclerc;" that defendants did not appear, and that judgment was rendered against them by default, and that the writ and action are illegal, and void, with conclusions that the judgment and seizure be annulled, and that plaintiff's action be dismissed, with costs. The prothonotary, thereupon, caused notice to be served on the bailiff charged with the writ of execution, who, thereupon, made his return that he was unable to proceed with the publications and sale of the goods and chattels seized, in consequence of the service upon him of the notice. On the first day of the following term of the Superior Court, plaintiff moved that the said opposition be rejected from the Record, with costs, for the following reasons: "Because the said paper writing, which is in the nature of a preliminary exception, to the declaration and action of plaintiff, was not accompanied with a deposit of the sum of £2 1s. 8d. required by the 112th article of the Code of Civil Procedure, and the 32nd Rule of Practice of the Superior Court, and because opposants did not, with said opposition, deposit, in the hands of the prothonotary of the said Court, a sufficient sum to meet the costs incurred, after the return of the writ, up to the judgment, as required by article 486 of the Code of Civil Procedure." The following was the judgment of the S. C.: "The Court, having heard the parties, upon plaintiff's motion of the seven-teenth day of April instant, that the paper writing fyled by opposants, on the third instant, and intituled opposition a jugement et affidavit," be rejected from the record of proceedings with costs, for the causes, matters and reasons mentioned in said motion, having examined the proceedings and deliberated, doth grant the said motion, and doth reject the opposition from the record with costs (See Art. 490 Code of Procedure, in addition to the articles men-

" tioned by mover)." RAINVILLE, for appelants: Deux questions se présentent sur ce jugement. La première est de savoir si les allégations de l'opposition sont de la nature d'une exception préliminaire, et la seconde de savoir, en supposant qu'elles seraient d'une telle nature, si, en plaidant par une opposition à jugement, les opposants n'étaient pas libérés de l'obligation de produire le dépôt requis pour les exceptions préliminaires. Sur la première question, nous croyons que le plaidoyer de misnomer ne peut pas faire le sujet d'une exception à la forme, et, sur ce point, nous citons, avec confiance, la cause de Jones vs McNally rapportée dans Stuart's Rep., p. 56, 2 R. J. R. Q., p. 283. Sur le second point, nous croyons que les opposants n'étaient pas obligés de faire de dépôt avec leur opposition. En effet, la loi et les règles de pratique n'exigent de dépôt qu'avec une exception préliminaire, produite dans les délais réglés et avec les formes voulues. Or, dans une opposition à jugement, rien de semblable n'est requis : aucun délai n'est fixé, et, d'après sa nature, tous les moyens à invoquer doivent être allégués en même temps et dans le même document. Cette opposition doit être accompagnée d'un affidavit, lequel, pour la Cour, est une garantie que les faits qui y sont allégués sont vrais. Voilà autant de raisons qui tont voir que le dépôt ne doit pas être requis. D'ailleurs la loi ne l'exige pas, et, dans semblable matière, surtout lorsqu'il s'agit de priver une partie d'un droit certain, on ne doit pas suppléer à la loi, même par inférence. Lorsque l'intimé a présenté sa motion, les appelants ont offert de parfaire le dépôt, s'il y avait lieu, cette demande aurait dû leur être accordée; et, dans le cas où cette cour serait d'opinion que le dépôt était nécessaire, elle devrait donner aux appelants le droit de le faire, et, cela, sans frais, vu l'offre faite. BETHUNE, Q. C., for Respondent: By reference to article 490 of the Code of Civil Procedure, it will be seen that such an opposition as the one fyled is held to form part of the proceedings upon the original suit, and to be a defence to the action, and, as such, subject to the provisions concerning

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the contestation of ordinary suits. Now, by reference to art. 116 of the Code of C. P., it will be seen that any informality " in the writ of summons, or service," must be pleaded by exception to the form, and art. 49 requires, on pain of nullity, the statement in the writ of the names and actual residence of defendants. It is quite clear, therefore, that the opposition in question is in the nature of a preliminary plea. according to article 112 of the said Code, and the 22nd Rule of Practice, no plea containing a preliminary exception can be fyled, unless it be accompanied with a deposit of the sum of £2 1s. 8d.; and, as the opposition fyled by opposants is in the nature of a preliminary exception, viz., an exception à la forme, it cannot by law be fyled, unless accompanied by the deposit. Besides this, according to article 486 of the Code, opposants were also bound to deposit, with the Prothonotary, when fyling their opposition, a sum of money sufficient to meet the costs incurred after the return of the writ, up to the judgment, viz. the sum of \$9.60, but the opposants wholly failed to do so. It is true that they depo-ited a less amount, and although appelants now contend that they offered to parfaire, there is no evidence whatever in the record that they did so.

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TASCHEREAU, J.: Il est évident que les appelants n'ont pas fait un dépôt suffisant, conformément à l'article 486; il est vrai que le déficit est peu de chose, et que la cour pourrait, peut-être, venir au secours des appelants et leur accorder de parfaire la différence, mais nous ne pouvons le faire, à raison de ce que le dépôt de £2 1s. 8d. sur l'opposition, comme exception préliminaire, n'a pas eu lieu. Nous considérons cette opposition comme une défense à l'action, comme une exception à la forme, et, conséquemment, comme un de ces plaidoyers préliminaires qui ne peuvent, conformément à l'article 112 C. P. C., être produits sans le dépôt de £2 1s. 8d. L'article 490 du C. P. C. énonce en propres termes, que "l'opposition au "Jugement n'est qu'une défense à l'action et comme telle " assujettie aux dispositions relatives aux contestations des "demandes ordinaires." Nous déclarons que cette défense des appelants plaidant mis-nomer est une exception à la forme exigeant un dépôt de £2 1s. 8d. Les appelants ont prétendu que le mis-nomer se plaide par exception temporaire, mais nous déclarons que les articles 49, 51, 116 décident que cette objection doit se faire au moyen d'une exception à la forme. En effet, l'article 49 dit que le bref de sommation doit contenir les noms, occupation et domicile du défendeur, l'article 51 dit que cette formalité est à peine de nullité, et l'article 116 énonce que cette informalité est le sujet d'une exception à la forme. Ce jugement de la cour dont est appel sera en conséquence confirmé avec dépens.

RAMSAY, J.: remarked that the case of Jones vs McNally had long since been overruled, by the case of Paradis vs Lamère (1), and by the constant jurisprudence of the courts.

LORANGER, J.; Les appelants ont fondé leur appel sur la proposition que le défendeur, condamné par défaut, en vacance, sur action portée sur un billet promissoire, peut baser son opposition à paiement, en vertu de l'article 484 du Code de Procédure Civile, sur des moyens qui, s'ils eussent été opposés sur l'instance originaire, auraient dû être l'objet d'une exception préliminaire, sans faire le dépôt voulu par l'article 112, qui porte: "Le plaidoyer contenant une exception prélimi-" naire ne peut être reçu, à moins qu'il ne soit accompagné " du dépôt de la somme de deniers fixée par les règles de pra-" tique du tribunal." Je dis que l'appel est fondé sur cette seule proposition, car il ne saurait y avoir de doute que l'exception fondée sur un faux prénom, qui est ici le moyen d'opposition, ne soit une exception préliminaire, malgré que les appelants aient prétendu le contraire. Au soutien de leur prétention, les appelants ont cité le jugement rendu à Québec, en 1811, dans une cause de Jones vs McNally, où il a été jugé que ce moyen fait l'objet d'une défense au fond, parce que, y est-il dit en substance, en ce cas, le défendeur assigné n'est pas le débiteur et il doit obtenir congé de la demande, qui alors sera rejeté sur un moyen de fond. Cette raison est excellente, dans le cas où le vrai débiteur n'est pas assigné, mais ne rencontre pas l'espèce actuelle, où le vrai débiteur a été mis en cause, sous un nom qui n'est pas le sien, et dit, et c'est tout ce qu'il peut dire: " Quoique je sois un débiteur, ou la personne mentionnée comme débiteur, au libellé de la demande, je suis assigné sous un faux nom, et l'assignation est invalide." Ce moyen forme évidemment ce qu'on appelait en France une fin de non procéder, et une exception à la forme ici. Malgré tout le respect que je porte aux anciennes décisions, je ne puis suivre celle-ci, qui est en contradiction avec tous les procéduriers, et avec la jurisprudence suivie depuis trente ans, à ma connaissance. Le nom des magistrats qui l'ont prononcée n'est pas donné par l'arrêtiste. Il serait surprenant que l'un d'eux eût été le juge en chef Sewell. Reste la question du dépôt. Le tribunal de première instance, sur motion de la banque, intimée, et au profit de laquelle se poursuivait l'exécution, en a proclamé la nécessité, en rejetant l'opposition. A première vue, et, en ne considérant que l'esprit de la législation qui a permis le pourvoi contre les jugements rendus par défaut, sur simple requête, dans certains cas, et sur simple

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⁽¹⁾ Le demandeur, dans le bref d'assignation, doit déclarer ses nom et prénom au défendeur. (*Paradis* vs *Lamère*, C. S., Montréal, 31 mai 1854, DAY, J., SMITH, J., et MONDELET, J., P. D. T. M., p. 99, et 2 R. J. R. Q., p. 379)

opposition dans certains autres, on serait porté à croire qu'en donnant à la partie condamnée par défaut le moyen de faire reviser le jugement et de se défendre, elle n'a entendu pourvoir qu'à une revision fondée sur un moven de fond, et n'a pas entendu inclure le moyen de forme. Cependant, outre que, sur l'article 162 du Code de Procédure Civile français, auquel notre propre Code de Procédure paraît avoir emprunté le 'abli sur les oppositions de ce genre, les système qu'il moyens de fori cumulent avec les movens de fond, ainsi qu'on peut le voir, à la question 689 du Traité de Carré sur l'article 162, notre article 492 proclame cette faculté en disant : "Si l'opposition est maintenue à raison de quelque irrégularité gné dans la procédure du demandeur...." La question de la nécessité radu dépôt se présente donc légitimement. On tire un argument contre cette nécessité sur l'article 486, qui n'ordonne que le dépôt d'une somme suffisante pour refonder les frais de la procédure du demandeur, encourus depuis le rapport du bref jusqu'à la signification du jugement, et l'on dit: si le Code eût contemplé d'autres dépôts, et, notamment, celui 811, dont on invoque l'absence, il aurait ajouté à la disposition relative à la revision une autre disposition particulière, par exemple, au cas actuel par voie de proviso, ou même par un article particulier, ce qu'il n'a pas fait. Donc, ire résulte de son silence. Cela, je crois, son intention coserait fort vrai, ticle 490 ne contenait implicitement au moins cette disposition spéciale, en disant: "La Requête en revision, ou l'opposition, est censée faire partie de la procédure dans la poursuite originaire, et être une défense à l'action et comme telle assujettie aux dispositions relatives aux contessuis tations des demandes ordinaires." L'opposition ici est donc Ce censée être une défense à l'action, et l'on pourrait être porté à croire que le Code n'a pas entendu permettre les oppositions fondées sur des moyens de forme, car, virtuellement, les moyens de forme ne constituent pas à proprement parler une défense à l'action qui ne s'entend que des moyens de fond, ıs, à mais, outre que, comme je viens de le dire, l'article suivant (art. 491) permet les moyens contraires, nous allons voir que l'un les dispositions précédentes avaient compris les exceptions du préliminaires dans la catégorie des défenses. L'opposition de la remplace donc ici l'exception à la forme, et est censée être exécette exception opposée in limine litis. Elle est donc sujette . A aux dispositions relatives à ce qu'aurait été la contestation islade la demande originaire. Or, la section première, intitulée : par "Dispositions générales," du chapitre troisième qui a pour titre nple "De la contestation en cause," traite des exceptions préliminaires depuis l'article 107 jusqu'à l'article 112, qui porte : " Le

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t pré-DAY, . 379) reçu, à moins qu'il ne soit accompagné du dépôt de la somme de deniers fixée par les règles de pratique du tribunal." Les règles de pratique prescrivent un dépôt spécial avec l'exception à la forme, qui est traitée par le Code comme une partie de la contestation, et qui, même suivant l'article 131, n'arrête pas l'instruction au fond, si le demandeur le désire, mais s'instruit simultanément avec lui, aux termes de l'article 490; il est à être fait en sus du dépôt de revision prescrit par l'article 486. En cette matière tout est de rigueur, et le jugement qui a décidé en ce sens me paraît à l'abri de la critique. Judgment of S. C. confirmed. (17 J., p. 162; 18 J., p. 237)

DUHAMEL, RAINVILLE & RINFRET, for appelants. BETHUNE & BETHUNE, for respondant.

TIERE SAISI.

SUPERIOR COURT, Montreal, 31st October, 1872.

Coram TORRANCE, J.

GRANT et al. vs TEASEL, and JAS McSHANE, jun., Tiers saisi.

Held:—1° That a tiers saisi is bound to give a detailed statement of the property and effects belonging to defendant in his possession.

2" That a tiers saisi, who declares on oath that he has nothing in his possession belonging to defendant, and, afterwards, when examined as a witness, admits having a number of articles of value, but refuses to give any precise or detailed statement thereof, will be condemned as the personal debtor of the plaintiff, for the value of such articles.

TORRANCE, J.: The plaintiffs obtained judgment against defendant, on 29th Dec., 1871, for \$374.21, with interest from 15th Dec., 1871, and costs, taxed at \$32.10. On the 24th Jan., 1872, they lodged an attachm in the hands of the Tiers saisi, James McShane, the younger, and he declared, on the 5th Feb., 1872, under oath, that he had not, at the time of service, had not then, and was not aware that he would have, thereafter, in his hands, possession or custody, any goods, credits, monies or effects belonging to defendant, in any manner whatsoever, on the contrary, defendant owed him £50, with interest, for fifteen months' rent. The plaintiffs contested this declaration, and alleged that defendant, in April, 1870, being lessee of the Tiers saisi, in a house on the Lower Lachine Road, left the Province of Quebec: that, at the time of his departure, he was possessed of a large quantity of household effects, carriages, waggons, sleighs and other chattels and effects of great value, to wit, \$1000; that the Tiers saisi,

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shortly afterwards, took possession of said house and effects, and converted the said furniture, waggons, sleighs, &c., to his own use, and hath refused to account for the same; that defendant was not indebted to Tiers saisi in any greater sum than £20 for rent; that the value of the effects converted by McShane was \$1000, in which sum he is indebted to defendant. Then follow the usual conclusions of the contestation of a Tiers saisi, praying that McShane be condemned, as the personal debtor of plaintiffs, to pay them the amount of their debt, interest and costs in this cause. The Tiers saisi specially answered this contestation, and said (admitting the lease), that Teasel absconded from the Province, leaving the premises unoccupied, and without paying his rent, and is still indebted to Tiers saisi in a sum exceeding \$200, for the year's rent ending 1st May, 1870; that in September, 1870, receiving information that the premises had been broken into, the Tiers saisi went there, with a police officer, and found that the house had been broken into, and, further, noticed that several articles had been stolen therefrom; that Tiers saisi placed a man in charge; "that, in an outhouse belonging to the pre-" mises, McShane discovered a harness and waggon, which he, "acting upon the advice of the police officer, caused to be "removed to a place of safety, and which said harness and " waggon McShane is prepared to return to the premises, if "so required to do by this Court; and McShane further avers "that these were the only articles or effects removed from "the said premises by him and for the reasons aforesaid; " also that there was not in the said house and premises, when "he so visited them, or since, goods, chattels or effects suffi-cient to pay said rent." The conclusion was for the dismissal of the contestation. The evidence is in substance as follows: Robert Irwin, examined 16th May, 1872, saw defendant, in April, 1870, who told him he was going to England, and, if he wished to go into his house, he might do so; took possession about 15th June; went there before this with Cullen, a blacksmith, and Eager's foreman, to look for some traces belonging to J. Paulblanc; went there a second time with Paulblanc; occupied the house just one month; made a list of articles he saw there, which he valued in detail at \$350 in all; left on 15th July; "and, about a fortnight after, I "went to the house again, on McShane's telling me the house "had been broken into. On this occasion, I saw some boxes " of paper overturned, as if some one had been there, but I "did not see that any of these things had been taken "away. I found the outhouse locked up as before;" speaks with great confidence as to value of harness; is a saddler and made most of it himself. John S. Hall, jun., son of one of the

plaintiffs, states while defendant resided in McShane's house he visited him, about once a week; values articles there at \$400, exclusive of household furniture; defendant kept a quantity of harness about equal to a saddler's shop. " I never "saw these articles in the premises after defendant's departure. " I saw, however, McShane driving defendant's waggon with "defendant's harness." Waggon and harness worth about Defendant left for England in April, 1870. Shortly before defendant's departure, witness assisted in nailing up the shed containing vehicles; did not visit the house after his departure. Alfred Greece worked for defendant when he occupied McShane's house; he left in April; helped him to put certain articles in room; also two single sleighs and one double sleigh, and a four-wheeled vehicle called a break, a light gig and waggon in shed; assisted young Hall to nail up shed. James McShane, examined 10th June, 1872, on being asked to state in detail the number, description and value of articles belonging to defendant, removed by him from premises leased, answers: "I never removed anything, except " an old red waggon, and a lot of old harnesses. The detective "advised me to take these effects to my own house, to place "them there, all of which articles removed by me I insisted "upon Tessel to examine at my house, where I had them "stored and where they are still." Question: "Can you "enumerate the articles taken by you or not, from the de-"fendant's premises?" Answer: "No. Some old harness, and "I think bridles, and one or two old sadles, which are still in the " same place where they were stored. There may have been "other things of no value," etc... "I have them still in my posses-" sion, as well as the waggon." Question: "Where did you find "that waggon?" Answer: "In the shed which had been broken " open." Question: "What other vehicles were in the shed besides the waggon?" Answer: "I swear that any other sleighs "or vehicles that were in the said shed are still on the "premises." McShane states that he rented premises to a new tenant in spring of 1871. Joseph McGrath, witness for Tiers saisi, states he was there when Detective Cullen and plaintiff visited place, in fall of 1870. The house had been broken into. David Drew states that he was placed in charge of house by McShane, in full of 1870; hall door broken, cellar door broken, window with two panes broken; trees around broken. Did not see any other damage in the house; only occupied one room and kitchen; rest of rooms locked. In cross-examination, witness states he did not go up stairs; that part of house was locked. We see here the Tiers saisi in possession of a considerable quantity of property and effects belonging to the defendant. Then, we have the fact proved

of his dri roads; th that he h dant: the asked to the article " anything " harnesse tion as to effects w defendant refusing In using what he authors, in depositary Depositari etiam fur tum, nemo licet propi interverter If any ev the goods, highest va When the it will be p that an ar When a me the parties affirmative "If a man, which the r presumption party has t the evidence the truth, t against his converted p as against l case, the property wl put upon the value of was include vehicles, hor Tiers saisi l amount adu ouse re at ept a never rture. with about ortly ng up after en he im to d one eak, a o nail 72, on n and a from except tective place asisted them n you he dess, and in the e been possesou find broken hed besleighs on the s to a ess for n and been charge , cellar round house; ocked. stairs; cisi in effects

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of his driving defendant's waggon and harness on the public roads; then, his denial under oath, on the 5th February, 1872, that he had anything in his possession belonging to defendant; then, in June, under examination as a witness, on being asked to state in detail the number, description and value of the articles by him removed, his answer is: "I never removed "anything, except one old red waggon, and a lot of old "harnesses." The Tiers saisi was bound to give full information as to the number and description of all articles and effects which had come into his possession belonging to defendant. Yet, we find him first denying the fact, and then refusing to give any distinct or definite enumeration. In using defendant's property for his own purposes, he did what he had no right to do. The language used by the authors, in reference to an act of this kind, on the part of a depositary is very strong. Muller, Prompt. vo. Furtum, N. 16. Depositarius, re deposită utens, fur est. **.. si intervertat, magis etiam fur est. Dig. Just. L. 47, t. 2, s. 69. Inficiando depositum, nemo facit furtum: nec enim furtum est ipsa inficiatio, licet propè furtum est. Sed si possessionem ejus apiscatur intervertendi causa, facit furtum. Mayne, Damages, [156]. If any evidence of value is withheld by the defendant, the goods, as against him, would be presumed to be of the highest value articles of that nature were capable of. (210:) When the defendant, in trover, will not produce the article, it will be presumed against him to be of the greatest value that an article of that nature can be. Taylor, Evid., § 347. When a matter is peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character. Broom's Maxims, [p. 893]: "If a man, by his own tortious act, withhold the evidence by which the nature of his case would be made manifest, every presumption to his disadvantage will be adopted. Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him. Thus, where a person who has wrongfully converted property will not produce it, it shall be presumed, as against him, to be of the best description." In the present case, the Tiers saisi must be held responsible for the property which was taken possession of by him, at the value put upon it by Irwin and Hall. According to Irwin, the value of the articles proved by him was \$350, in which was included \$70, for furniture. Hall proved the value of the vehicles, horses, &c., exclusive of the furniture, at \$400. The Tiers saisi had made no proof of damage or rent, beyond the amount admitted by plaintiff, viz., \$80. The Court would, therefore, give judgment for \$470, and costs, less the \$80 admitted. The following is the judgment: "The Court, hav-" ing heard plaintiff's, contestants, and the Tiers saisi, James "McShane, junior, as well on the motion of plaintiffs to " reject the deposition of Andrew Cullen, as on the merits " of this cause; Considering that it does not appear, by the " said deposition, that plaintiffs were called to cross-examine " Cullen, or that the deposition was taken at Enquête sittings, " doth grant said motion with costs, and doth in consequence " reject the said deposition from the record in this cause; "Considering, also, that the Tiers saisi, by his declaration, " declared, under oath, in answer to the Saisie-arre't served " upon him, on the 24th day of January, 1872, that, at that "date, he had not, nor had he on the date of his declaration, "to wit, on the fifth day of February, 1872, nor would he " have, thereafter, in his possession or custody, any goods or " effects belonging to defendant, in any manner whatever; " Considering that the Tiers caisi, subsequently, to wit, on the "10th day of June, 1872, while under examination as a " witness, while admitting that he had a vehicle and harness " of the defendant, did not specify, as he was bound to do, " in answer to the questions put to him, the number, descrip-"tion and value of the articles taken by him from the " defendant's house; Considering that the Tiers saisi answer-" ed evasively the questions put to him at said examination; "Considering that it appears, from the evidence of Robert " Irwin, that there were in the premises occupied by defen-"dant, in the month of July, 1870, property to the amount "of \$350, apart from the sleighs and waggons and gig " described by the witness Hall; Considering that the value " of the articles seen there by the witness Hall is stated by "him to have been about \$400, exclusive of household furni-" ture, which furniture is valued by the witness Irwin, at an "additional sum of \$70 and upwards; Considering that the " Tiers saisi has given no satisfactory account of the disap-" pearance of said articles, or of the number, description and "value of the articles of defendant, which came into his " possession, and has failed to furnish a detailed statement "thereof, as required by article 619 of the Code of Civil Pro-" cedure; Considering his denial under oath, on the 5th day " of February, 1872, that he had anything belonging to defen-"dant; Considering that it is in evidence that the Tiers saisi " converted to his own use, property of defendant of value, " but that information of the precise description and value " thereof is withheld by the Tiers saisi; Considering that the "burden of proof was upon the garnishee to establish the " quantity and value of the effects of defendant in his pos-

" session " stances " evidenc " ing the " Tiers so " \$80, as " overrul " the decl " insuffici " doth de " to be go "at the " indebted " \$80, to " the 24th "as the p " plaintiffs " day of J " judgmen " and doth " attachme etc. (17 J Cross &

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Held:—In assignee under droit de rêten the waggon w

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session; Considering that the Court is, under the circum-" stances, justified in estimating said articles, according to the "evidence of Irwin and Hall, at the sum of \$470; Consider-"ing that it does not appear from the record that the " Tiers saisi is creditor of defendant for a greater sum than "\$80, as admitted by the contestation of plaintiffs, doth " overrule the answer of the Tiers saisi, and doth adjudge "the declaration of McShane, junior, as such garnishee, to be "insufficient and unfounded, and doth set aside the same, "doth declare the attachment in the hands of the garnishee "to be good and valid, doth adjudge McShane, to have been, "at the date of the service upon him of the attachment, "indebted to defendant in the sum of \$470, less the sum of "\$80, to wit, in the sum of \$390, with interest thereon from " the 24th day of January, 1872, and doth condemn McShane, "as the personal debtor of plaintiffs, to pay and satisfy to " plaintiffs the said sum of \$390, with interest from the 24th "day of January, 1872, on account and in deduction of their " judgment against defendant, in principal, interest and costs, "and doth condemn McShane, to pay the costs of the present "attachment and contestation of his declaration, distraits," etc. (17 J., p. 163)

CROSS & LUNN, for plaintiffs. B. DEVLIN, for Tiers saisi.

PRIVILEGE DE L'OUVRIER.

SUPERIOR COURT, Montreal, 30 September, 1872.

Coram MACKAY, J.

STEWARF vs LEDOUX.

Held:—In the case of a Sainie revendication of a waggon, by an assignee under the Insolvent Act of 1869, wherein defendant pleaded a droit de rétention for repairs, that plaintiff cannot claim possession of the waggon without pre-payment of, or security for such repairs.

This was a hearing on law, on the issue raised by plaintiff's answers in law to defendant's pleas. The plaintiff, as assignee, under the Insolvent Act of 1869, seized, by process of revendication, in the hands of defendant, a waggon alleged to belong to the estate of the insolvent. The defendant pleaded, in effect, that he had done sundry repairs to the waggon, and that plaintiff could not claim the possession of the waggon, without first paying the value of such repairs. The plaintiff demurred to these pleas, contending that, under the Act, the property in the waggon passed to plaintiff, as assignee, and that any claim which defendant,

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had against the estate for the repairs, could only be legally recovered by means of a claim fyled under the Act. The Court dismissed the answers in law, and maintained the sufficiency of the pleas. (17 J., p. 167; 2 R. C., p. 482)

J. C. BUREAU, for plaintiff.

DE BELLEFEUILLE & TURGEON, for defendant.

INSCRIPTION.—PROCEDURE.

COURT OF REVIEW, Montreal, 30th September, 1872.

Coram Mackay, J., Torrance, J., Beaudry, J.

ALLAIRE vs MORTIMER.

Held:—That eight days' notice must be given to the opposite party of an inscription for proof and hearing on the merits at the same time, and that a simple receipt of copy on such an inscription for the 27th and dated the 21st, is not a waiver of the right to object thereafter to the shortness of the notice.

This was a review of a judgment rendered by the Superior Court, at Montreal, in favor of plaintiff. The case had been inscribed for enquete and final hearing on the merits at the same time, and no special application was made to reject the inscription, on the ground of short notice. The defendant inscribed in review, and urged that the judgment was bad, inasmuch as the inscription on its face contained a receipt of a copy dated the 21st, for proof and hearing on the 27th of February, 1872. And the Court sustained the point raised, but without costs in Review, deciding that the words: "Received copy 21th February, 1872" are not equivalent to the words and do not amount to "Received notice," and, in doing so, reversed the judgment complained of, set aside the inscription and all the proceedings had in the case subsequently to the 21st of February, and ordered that the parties should be placed in the state they were in on that day. The following are the reasons assigned in the judgment: "La Cour, considérant que l'avis du 15 février, filé le 21 février, pour enquête et audition sur les mérites de la cause, le 27 février 1872, n'était pas suffisant; le Code de Procédure exigeant avis au moins 8 jours avant celui fixé pour l'enquête dans une telle cause; Considérant que le défaut de tel avis, par l'espace de 8 jours, n'est pas couvert par le reçu daté du 21 février, écrit par le conseil du défendeur, sur la face de l'inscription." &c. Judgment of Superior Court reversed. (17 J., p. 168; 2 R. C., 475)

JETTÉ & ARCHAMBAULT, for plaintiff. RITCHIE, MORRIS & ROSE, for defendant. In the up THE al.,

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Held: claims to t be allowed suspend al the petitio

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eversed.

RECUBATION OF AN ASSIGNEE.—INSOLVENT ACT OF 1869.

SUPERIOR COURT, Montreal, 14th March, 1873.

Coram Johnson, J.

In the matter of RICHARD WORTHINGTON, an Insolvent, and THE MECHANICS BANK, Claimant, and GEORGE BALL et al., Contesting.

Held:—That, on a petition by the claimant, alleging facts which he claims to be legal grounds of recusation of the assignee, and claiming to be allowed to recuse the assignee, the judge will order the assignee to suspend all further proceedings, and order proof of the facts alleged in the petition.

PER CURIAM: A petition has been presented to me, on behalf of the claimant, recusing the assignee, who, by law, has to hear and determine the contestation pending in this case, and asking for an order to him to suspend further proceedings, as official assignee, upon the contestation in question, until the matters alleged are substant ated or otherwise, This application is resisted by the assignee, and by the party contesting; and they contend that an assignee cannot be recused, and that the insolvent statutes have regulated the cases in which his functions can be superseded by order of the Court. Sec. 137 of the Act of 1869 provides for certain cases of disqualification in a judge sitting in insolvency, and also for the case of assignees being so disqualified. The language of the Act as respects the assignee is as follows: "And if the assignee to any estate be a claimant thereon as a creditor, or be collocated for any charges or remuneration, or be the agent, attorney or representative of any claimant thereon, he shall not hear, award or determine upon any contestation of his own claim or collocation, or of the claim of the person represented by him, or of any dividend thereon, or upon any contestation or issue raised by him, or by the person represented by him; but in such case such contestation shall be decided by the judge, subject to appeal, as hereinbefore provided." By sec. 9 of 34 Vic., c. 25, it is enacted that relationship by marriage, or within the degree of first cousin, to any of the parties before him, shall disqualify the assignee in the same manner as he is disqualified for the causes mentioned in the 137th section of the Act of 1869. The petition before me sets out that, in the contestation of the claims of the Bank, the assignee has acted with partiality, as if he were the agent or solicitor of the contesting parties; that he expressed a decided opinion that he

had formed upon one considerable part of the contestation. respecting 46 cases of books, an opinion which he stated he had formed on private information received by him. It further alleges that the assignee has been illegally employed, by the contestants and their agents, to collect information for the purpose of contesting the claim of the Bank, and, without the authority of the inspector of the insolvent's estate. There are more ample al'egations still, tending to show gross partiality, which it is not now necessary to refer to. The assignee has fyled his declaration, denying the truth of the contents of the petition, and the suggestion now before me is whether I am to order a suspension of proceedings, and proof of petition. The present application is apparently not based on the 137th section, as it does not ask simply, as provided by that section, that the hearing of the contestation be transferred from the assignee to the judge; but only asks now that the petitioners may be allowed to prove their allegations, and to recuse the assignee, and that, upon proof, he may be recused and declared incompetent to act further in the matter. It is argued that there is no such thing provided for in the law as the recusation properly so called of an assignee; but I hold that I am bound, under the supervisory discretion vested in the Judges of this Court, over their officers, of whom the assignee in this case is clearly one, to deal with facts and remedies, and not merely with names and forms. It is not my duty to seek texts of statutes directly authorizing, strictly and technically, the recusation of an assignee to an insolvent estate. There is, indeed, I believe, no such direct authority, in the case of an assignee eo nomine; though the proceeding is substantially had every day, in the case of experts; and, even in the case of commissioners of expropriation, it has been adopted. But it would rather be the duty of a Court of Justice, in such a case, to make sure of the existence of some plain legal provision, abrogating the natural right of every man, to have his case determined by those who have no direct interest in deciding against him. The assignee in this case is exercising, within certain and narrow limits suited to his office, the functions of a judge. One of the parties before him says, you are acting with partiality, and as the agent of another party contesting my right. I do not want to be judged by you. I have good reasons. I will prove them, if I am allowed. Under these circumstances, it is my duty to turn to the written law of the land, and to the plain principles and practice of the administration of justice. I find the first words of the written expression of the law in the Code of Procedure, Art. 176, to be: "Any judge may be recused." It is true I do not find

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Ex parte

Held:—The lic peace, by him, and by quashed.

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the word 'assignee,' any more than I do that of expert, or commissioner for expropriation, or commissioner for the trial of small causes, or justice of the peace; but I will not violate a sacred principle, inseparable from the due administration of justice, for the mere omission of a name. I rather hold that the words 'any judge' include all those who exercise, even within certain limits, judicial functions, and I, therefore, order the proceedings on this constestation to be suspended, until this petition has been disposed of upon proof. It is not necessary to observe that the declaration of the assignee would be conclusive, unless the contrary were proved by the petitioner, and that this proof must by law be made in writing; but, as all the facts referred to in the petition, are facts depending upon written memoranda said to be in possession of the assignee, and, upon the books and proceedings also in his custody, the verification of the facts cannot cause any serious delay. As to whether the recusation was necessary at all, I give no opinion; the matter, if it could have been brought before the Court, by simple petition, would probably have been disposed of quite as satisfactorily; but the preliminary step of a recusation having been taken, I consider it my duty to the party applying, as well as to the assignee, to order proof. Proof on petition ordered. (17 J., p. 169; 3 R. C., p. 90; 4 R. L., p. 680) E. BARNARD, for claimant. A. & W. Robertson, for the assignee.

BETHUNE & BATHUNE, for contestants.

CERTIORARI.

Superior Court, Montreal, 31st October, 1872.

Coram Torrance, J.

Ex parte ROULEAU for certiorari.

Held:-That a conviction before a J. P., for having disturbed the public peace, by gravely insulting a party, and by committing an assault on him, and by crying out and threatening to beat him, is bad and will be quashed.

This was a certiorari, praying that a conviction of the petitioner, before a Justice of the Peace, on a charge of having disturbed the public peace, by gravely insulting one Brunet, and by committing an assault upon him, and by crying out, and threatening to beat him, be quashed as illegal. TOME XXIII.

The Court granted the motion to quash the conviction, assigning as a reason "that the conviction does not appear to be warranted by any law or statute in such case provided." Certiorari maintained. (17 J., p. 172; 4 R. L., p. 680)

McCoy and Lefebure, for applicant.

BÉLANGER, DESNOYERS and OUIMET, for complainant and J. P.

MAITRES ET SERVITEURS.—PREUVE.

COUR DE CIRCUIT, Montréal, 30 novembre 1872.

Coram Torrance, J.

CYR vs CADIEUX.

Jugë: Dans une action pour salaire, par un domestique, que la Cour peut prendre la déclaration du maître, et se détorminer par les circons-

Le demandeur réclame du défendeur la somme de \$38.10. pour 2½ mois de salaire, comme domestique ou employé de ferme. Entr'autres choses, le défendeur allègue, par un plaidoyer spécial, un engagement verbal, pour une année, au prix de \$185, qu'il offre de prouver par son serment, et prétend que le demandeur ayant, sans raison valable, malgré les protestations réitérées du défendeur, abandonné le service de ce dernier, avant l'expiration de son engagement, son action doit être déboutée. Il n'y a aucun doute que, d'après la loi et la jurisprudence établie, le serviteur qui déserte le service de son maître avant l'expiration de son engagement, ne peut être reçu à réclamer le salaire qui pourrait lui être dû, pour le temps qu'il a fait; car le maître ne peut être tenu de payer le salaire de son employé qu'en autant que ce dernier a rempli, de son côté, ses obligations. Mais le demandeur prétend que, d'après l'engagement verbal allégué par le demandeur, il avait été expressément convenu qu'il pourrait abandonner le service du défendeur quand bon lui semblerait, et que, dans ce cas, ce dernier serait tenu de lui payer le temps qu'il aurait fait. Le défendeur, admis (en vertu de l'article 1669 du Code Civil), à prouver, par son serment, l'engagement allégué par son plaidoyer, nie formellement les avancés du demandeur. Le défendeur a aussi produit des témoins qui tendaient à prouver des aveux de la part du demandeur que l'engagement était tel qu'allégué par le défendeur. De son côté, ce dernier fait entendre quatre témoins, son père et trois

sœurs, deur s sur la j suit: " " servit " offrir " aussi " détail " il peu " aux n réservée Le text plusieur Cour, ap du défer boutée.

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Ex parte Oppo

Held:-Ti cap. 26 (Qu Superior Co

A petiti Superior (1872, in th for the int drunkard, (Quebec). 26th Octob evidence ta of the rela the interdic on the 28th prothonotar

(1) Vide Pot de Notoriété, p sœurs, qui prouvent les allégations de sa réponse. Le défendeur s'est objecté à cette preuve comme illégale, s'appuyant sur la première partie de l'article déjà cité, lequel se lit comme suit: "Dans toute action pour salaire par les domestiques ou " serviteurs de ferme, le maître peut, à défaut de preuve écrite, " offrir son serment quant aux conditions de l'engagement et "aussi sur le fait du paiement, en l'accompagnant d'un état "détaillé. Si le serment n'est pas offert par le maître, "il peut lui être déféré, et il est de nature décisoire quant "aux matières auxquelles il est restreint." Cette objection réservée par la Cour, renferme toute la difficulté de la cause. Le texte de la loi est formel, et, appuyé sur l'autorité de plusieurs anciens auteurs cités par les codificateurs, et la Cour, après mûr examen de la question, prononce en faveur du défendeur et déboute l'action du demandeur. Action déboutée. (1) (17 J., p. 173; 4 R. L., p. 681)

LORANGER et LORANGER, pour le demandeur.

ALDÉRIC OUIMET, pour le défendeur.

INTERDICTION POUR IVROGNERIE.

SUPERIOR COURT, Sainte-Scholastique, 20th March, 1873.

Coram Torrance, J.

 $Ex\ parte$ Isidore Thérien, Petitioner, $and\ Gédéon\ Lauzon$, Opposant.

Held:—Than an interdiction, for habitual drunkenness, under 33 Vic., cap. 26 (Quebec), cannot be pronounced by the prothonotary of the Superior Court, in the absence of the judge, under C. C. P. 465.

A petition was presented to the prothonotary of the Superior Court, District of Terrebonne, on the 15th October, 1872, in the absence of the judge, under C. C. P. 465, praying for the interdiction of Gédéon Lauzon, as being an habitual drunkard, according to the provisions of 33 Vic., Cap. 26 (Quebec). An assembly of the relatives was held, on the 26th October, at which, Lauzon was present, and, after evidence taken by the prothonotary, and advice, under oath, of the relatives, the prothonotary, the same day, pronounced the interdiction. Gedéon Lauzon, in the terms of C. C. P. 465, on the 28th October, fyled an exception to the order of the prothonotary on two grounds: 1st. That the prothonotary

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⁽¹⁾ Vide Pothier, Louage, nº 175; Ancien Denisart, vº Gages, nº 6, Actes de Notoriété, p. 304; Nouv. Den., Gages, p. 143.

had no jurisdiction, but only the judge. 2nd. That the service of the petition had not been made upon the opposant in the terms of the statute.

The case was argued before the Court in the February

term (1873).

PER CURIAM: The objection of the opposant as to the insufficiency of the service of the petition upon him has not occupied the Court from the record of proceedings shewing that the opposant was present at the assembly, but not shewing that he then took exception to the insufficiency of the service. There remains the other question as to the jurisdiction of the prothonotary in the absence of the judge. Admitting for the sake of argument that the prothonotary had jurisdiction in the absence of the judge by C. C. P. 465 at the time when that article of the Code of Procedure took effect as law in 1867, we have to look at the provisions of 33 Vic., C. 26, providing for the interdiction of drunkards. This mode of interdiction was created by the Act which came into force on the 1st February, 1870.

The first clause reads: "On petition, under oath, presented to any one of the judges of the Superior Court for Lower

Canada, who alone shall have power to act, &c., &c."

This clause gives exclusive jurisdiction to the judge, and the exception fyled by the opposant to the order of the prothonotary must be maintained, and the order set aside and annulled. Exception maintained. (17 J., p. 174; 4 R. L., p. 681)

DE MONTIGNY, for opposant.
PRÉVOST and ROCHON, for petitioner.

SURVEY .- COSTS .- NULLITY.

CIRCUIT COURT, Sainte-Scholastique, 20th March, 1873.

Coram TORRANCE, J.

BEAUDRY vs TOMALTY et al.

Held:—1. That where a surveyor commits a notable fault in the making of a survey, and his report is in consequence set aside by the Court, he is not entitled to claim fees for his work.

2. That a failure to give the requisite notice to the parties before proceeding, is such notable fault.

The plaintiff's action was to recover from defendants, jointly and severally, \$43.50, costs of a survey made by him, in an action en bornage between the two defendants.

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The defendants pleaded separately that the survey made by plaintiff had been of no avail or advantage to them, in consequence of plaintiff's neglect to comply with requisite formalities, and, among others, to give the parties due notice of his proceedings, in consequence of which neglect, the Court had set aside the report made by him of the survey. The evidence of record showed that plaintiff, by judgment of the Circuit Court, for the County of Argenteuil, at Lachute, on the 30th May, 1868, in the cause No. 173, Tomalty vs Broadfoot (Aimé Lafontaine, J.), was appointed to run the line between the properties of the then plaintiff and then defendant, and "to establish the said line, in presence of the respective parties, or after due notification to them, &c." The plaintiff made a survey and report to the Court, fyled 11th January, 1869, which, by judgment of the same Court, on the 16th Sept., 1869, was set aside, "considering that defendant (Broadfoot) was not duly notified of the survey to be performed by the surveyor, and that defendant, was not duly represented at the survey." The notice, by plaintiff, that he would proceed, under the order appointing him, to make the survey, was served on the two defendants on the 2nd September, 1868, requesting them to be on the spot, on the third of the same month. The plaintiff's report to the Court states, "after due notification of the parties, as it " appears by the return of the bailiff, dated the second day of "September, 1868, the parties appeared, Tomalty personally, " and Broadfoot represented by his son, David Broadfoot."

Burroughs and Filion, for defendants cited C. C. P. 943 and 333.

W. Prévost, for plaintiff, contended that the proceedings, in the other case of Tomalty and Broadfoot, setting aside the report was res inter alios acta, and that his client should not lose his fees and disbursements, without crassa negligentia, which did not appear.

PER CURIAM: C. C. P. 333 requires the expert to give three days notice of his proceedings, in any case, unless there is a distinct waiver, which does not appear here. By C. C. P. 943, the same rule is to be observed by the surveyor en bornage. Was David Broadford authorized to represent his father? It does not appear, and the Court, at Lachute, has not given an unreaded give due not expert and the plaintiff was certainly require give due not expert without which his proceedings were of avail. It was an indispensable preliminary and condition. An appear of the Cour de Rennes, 16th July, 1812, decides that the experts must support the cost resulting from the annulling of a report, as a consequence of a notable fault on their part. (Journal des Avoués: T. 12, p. 709.) Carré, by

Chauveau, says, t. 3. p. 134, No. 1216, A.D. 1862: "Cette décision nous paraît fort équitable." This Court holds that the omission to give the notice in time is a notable fault, and that the plaintiff, in consequence, is not entitled to his bill. The action is dismissed. (17 J., p. 175; 4 R. L., p. 681.)

PRÉVOST and ROCHON, for plaintiff.

J. H. FILION, for Broadfoot. C. S. BURROUGHS, fo Tomalty.

DEPENSES A UNE ELECTION.

CIRCUIT COURT, Montreal, 1st April, 1873.

Coram TORRANCE, J.

JOHNSON et vir vs DRUMMOND.

Held:—That the supply of refreshments, to a gang of men collected, during an election of a representative to the Commons of Canada, to be used in case of an emergency, gives rise to no action at law for payment of the refreshments.

The action of plaintiff was to recover \$72. The declaration alleged that, in the month of August last, defendant was a candidate, for the representation, in the Commons of Canada, of the electoral division of Montreal West, the voting, at which election, took place at the city of Montreal, on Wednesday, the 28th day of August last; that defendant, and the committee representing and working for him, hired a large number of men, to be ready in case of emergency, during the said election, and sent fifty of them to the place of business of the female plaintiff, where they remained during the 24th, 26th, 27th and 28th days of the month of August, and were furnished with refreshments, by the female plaintiff, at the instance and solicitation of defendant, and his committee, and, for the benefit and on the account of defendant; that the said gang of hired men was visited, at intervals, during the said days, by members of the said committee, and by their and defendant's employees, for the purpose of calling the roll, and paying the wages of the said hired men, and the said roll was called, and the said wages were paid, to the said hired men, in the female plaintiff's establishment. Then followed the "quantum meruit." The defendant demurred to the declaration, on the ground that the expenses sought to be recovered arose out of a parliamentary election, and, as such, were not recoverable.

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Held.—Ti members of tains securi pounding of amount tha member of recover the an exceptio

KERR, Q. C., for defendant, cited C. S. C. chap. 6, s. s. 82, 83; 23 Vic., chap. 17, s. 6 (A. D., 1860); Confederation Act

(1867), s. 41; 34 Vic., C. 20, s. 2, 9 [Canada].

PER CURIAM: The Act of 1860 enacts that "every execu-"tory contract or promise or undertaking, in any way re-" ferring to, or arising out of, or depending upon any Parlia-" mentary Election, even for the payment of lawful expenses, " or the doing of some lawful act, shall be void in law." The plaintiff contends that this provision has not been kept alive by the Confederation Act of 1867, which makes certain provisions for elections, by s. 41, and they shink that 34 Vict., C. 20, s. 9, shows this, by re-enacting the c. uses of the Act of 1860. The defendant, on the other hand, contends that s. 41 of the Confederation Act kept alive the provision of 1860, and that the enactment of 34 Vic. was only made, in order to extend the provision over the Provinces of the Dominion. The Court is with defendant on these questions. But another grave consideration may be suggested. Art. 990 of our Civil Code enacts that contracts are illegal which are contrary to good morals, or to public order. Here, we have plaintiffs alleging that they supplied refreshments to a gang of 50 men collected by defendant, to be ready in case of an emergency. Against whom were these men to be used? Was it in support of public order, or otherwise? We are not informed. were certainly organized as an "imperium in imperio," and the Court has no hesitation, in deciding that the cause of action disclosed by the declaration is unlawful, and the action must be dismissed. Action dismissed. (17 J., p. 176; 4 R. L., 682).

D. BROWNE, for plaintiff.

W. H. KERR, Q. C., for defendant.

OBLIGATION SOLIDAIRE.—CONCORDAT.

Superior Court, Montreal, 30th September, 1872.

Coram BEAUDRY, J.

The Molsons Bank vs Connolly.

Held.—That, when a creditor agrees to a composition with one of two members of an insolvent firm, (without discharging the other) and obtains security for such composition, and, afterwards, releases the compounding debtor (without the consent of the other debtor) for a less amount than the composition, and surrenders the security, the other member of the firm, in an action against him, by such creditor, to recover the balance of his claim, may successfully resist the action, by an exceptio cedendarum actionum.

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This was an action by the Molsons Bank, as well in its own right, as being also the legal holder of certain promissory notes belonging to the Bank of Montreal, to recover from defendant, as having been a member of the firm of Connolly, Lantier & Co., the sum of \$36,004,55, and interest. The defendant pleaded, in effect, that the firm was insolvent when the notes sued on became due; that J. O. Lantier, one of the firm, was largely indebted to the firm and defendant, at the time of the dissolution of the firm, by such insolvency; that the two banks agreed to a composition of ten shillings in the pound, from Lantier, and obtained, from him, ample security therefor, by mortgage on his real estate; that, subsequently, without defendant's consent, the banks released Lantier, by accepting about five shillings in the pound, on their claims, and discharged their mortgages. And, that, in consequence, the banks were unable to cede to defendant the actions and mortgages which they so had and held respectively against Lantier, and his property, and, thereby, deprived defendant of all remedy or recourse, for the recovery, from Lantier, or his estate, of any portion of the composition, which he so originally engaged to pay the banks. At the hearing defendant's counsel relied on Pothier, on Obligations, Nos. 275 and 557, and the Arts. 2070 and 2071 of the Civil Code of L. C.

"The Court, considering that plaintiffs did take and receive, from Jean O. Lantier, one of the late firm of Connolly, Lantier & Co., who signed the notes in plaintiff's declaration mentioned, an obligation before C. F. Papineau, and colleague, notaries, bearing date the 4th day of April, 1860, whereby Lantier promised and bound himself personally to pay to plaintiffs the sum of \$9270.78, on demand, with interest thereon, at the rate of seven per cent., and, for security of the payment of said sum, being a portion of the amount due plaintiffs, by the firm of Connolly, Lantier & Co., did affect and hypothecate, to and in favor of plaintiffs the immoveable property described in said deed, and being the private property of Lantier, and considering that the Bank of Montreal, likely, did take and receive from Lantier an obligation before C. F. Papineau, and colleague, notaries, bearing date the 11th day of April, 1860, whereby Lantier did promise and oblige himself to pay the Bank of Montreal the sum of \$8777.00, on demand with interest thereon, at the rate of seven percent, per annum, and, for security of the payment of the said sum, being for a certain portion of advances made by the Bank of Montreal to Connolly, Lantier & Co., the said Lantier did affect and hypothecate the immoveable property described in said deed, being his own private property; and, considering that, at said dates no other claim appears to have been due to plaintiffs and said

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Bank of Montreal, but the two notes mentioned in plaintiffs' declaration, and that the said two obligations were so given to cover ten shillings in the pound of the respective claims of said banks; Considering that, at the time of the passing of the said obligations, the firm of Connolly, Lantier & Co. was insolvent, as well as the said Lantier; and, considering that, afterwards, to wit, on the 6th day of September, 1860, by deeds executed before C. F. Papineau, and colleague, notaries, the said banks respectively in consideration of certain sums of money, to them respectively paid by Lantier did without the consent of defendant, grant to him a full discharge of the aforesaid obligations and hypotheques, thereby created upon Lantier's private real property, and, thereby, became and are unable to cede and transfer to defendant any right or recourse whatever against Lantier, or his representatives; Considering that, after said discharge, by the banks, Lantier was enabled to sell the said real property, and obtain, therefrom, for his own use and benefit, large sums of money, which should otherwise have been paid to and received by the banks, in discharge of defendant; and, considering, moreover, that it is in evidence that defendant had large claims against Lantier, in liquidation of the business of the firm, and that, by reason of the aforesaid mortgages and discharges, he was prevented from exercising his recourse against Lantier, and, considering that the letter bearing date the 11th of April, 1860, addressed to Wm. Sache, cashier of the Molsons Bank, purporting to be signed by Connolly, Lantier & Co., was written and sent by Lantier, when the firm was no longer subsisting, and could not bind defendant; Considering that, for the reasons above mentioned, plaintiffs' action is barred, and cannot be maintained: Doth dismiss the said action, with costs." (17 J., p. 189; 4 R. L., p. 683).

HON. J. J. C. ABBOTT, Q. C., for plaintiffs. STRACHAN BETHUNE, Q. C., for defendant.

INSCRIPTION IN REVIEW.

COURT OF REVIEW, Montreal, 23rd May, 1873.

Coram Mackay, J., Torrance, J., Beaudry, J.

SHEPPERD vs BUCHANAN.

Held:—That an inscription which has been discharged, on application of the opposing party, in the absence of the inscribing party, may be replaced on the rôle during the same term, and before the actual remission of the record, on sufficient cause shewn.

This was a motion by plaintiff (the party inscribing), to restore the case to its place on the rôle; the inscription having been discharged, on the application of defendant's attorneys, in the absence of plaintiff's attorney, who represented to the Court, by affidavit, that he was so absent, in consequence of missing the railroad train.

MACKAY, J. (dissentions), was of opinion that the Court was no longer seized of the case, the judgment having been actually pronounced, and, therefore, that it was quite out of

their power to grant the motion.

TORRANCE, J.: I have always understood, that, where an application like the present is made during the same term that the inscription has been discharged, the Court is still sufficiently seized of the case to be able to entertain the motion. On the merits, there can be no doubt that the Court should come to plaintiff's relief. I am quite satisfied also that the Court of Appeal, under similar circumstances, would restore the case to the rôle. The motion is, therefore, granted, but it must be understood that what we are doing is not to be regarded as a precedent. Motion granted. (17 J., p. 191; 4 R. L., p. 684.) JAMES O'HALLORAN, Q. C., for plaintiff.

BETHUNE & BETHUNE, for defendant.

COUR DE CIRCUIT.—COMPETENCE.

Cour de Circuit, Montréal, 31 mars 1873.

Coram BEAUDRY, J.

MICHEL LAURENT, requérant, vs La Corporation du VILLAGE ST-JEAN-BAPTISTE, défenderesse.

Jugé: -Que la Cour de Circuit ne peut pas prendre connaissance de la validité d'un rôle d'évaluation.

PER CURIAM: La cour de Circuit peut-elle prendre connaissance de la validité d'un rôle d'évaluation? Au soutien de cette proposition, on invoque les articles 100 et 698 du Code Municipal: examinons ces deux articles. L'art. 100 porte:

"Tout procès-verbal, rôle, résolution ou autre ordonnance "du Conseil Municipal, peuvent être cassés par la cour de " Magistrat ou par la cour de Circuit du comté ou du district, " pour cause d'illégalité, de la même manière, dans le même " délai et avec les mêmes effets qu'un règlement municipal, et "sont sujets à l'application des articles 461 et 705." L'art. 698 statue: "Tout électeur municipal en son nom propre peut, " par une requête présentée à la cour du Magistrat ou à la

" cour c " pour (" cipal a ces deux municip l'art. 10 donnanc n'est pas peut seu l'art. 734 738, au de ceux peut être c'est l'ac nommés contrôle, 585, 716, n'est don assujetti Code Mu quant dir local n'a n'y a eu a ils pu y a tion fait ; encore, il aurait-elle nul le rôl juridiction et c'est ce cause Mcl 80. Les de dont les re

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" cour de Circuit du comté ou du district, demander et obtenir, " pour cause d'illégalité, la cassation de tout règlement muni-"cipal avec dépens contre la corporation." Dans mon opinion, ces deux articles n'ont trait qu'aux actes faits par le conseil municipal, savoir, tout reglement, suivant l'art. 698, et suivant l'art. 100, "tout procès-verbal, rôle, résolution ou autre ordonnance du conseil municipal." Mais le rôle des évaluations n'est pas un acte du conseil Municipal; le conseil Municipal peut seulement le reviser, le modifier ou le compléter suivant l'art. 734. Les amendements par lui faits, conformément à l'art. 738, au rôle, seraient bien des actes tombant dans la catégorie de ceux mentionnés en l'art. 100, mais le rôle lui-même ne peut être rejeté ni passé sous silence par le conseil Municipal; c'est l'acte d'officiers municipaux [art. 365] qui, quoique nommés par le conseil local, ne sont pas néanmoins sous son contrôle, leurs fonctions étant réglées par la loi [art. 366, 375, 585, 716, 717, 727, 728, 730, 731, 733]. Ce rôle d'évaluation n'est donc pas un de ces rôles dont parle l'art. 100, et il n'est assujetti qu'aux règles contenues dans le ch. II du titre II du Code Municipal. Les requérants ici se sont trompés en s'attaquant directement au rôle d'évaluation sur lequel le conseil local n'a fait aucnn acte, ni rendu aucune décision, puisqu'il n'y a eu aucun procédé adopté à cet égard. Peut-être eussentils pu y arriver incidemment, en attaquant le rôle de cotisation fait par le conseil local basé sur ce rôle d'évaluation; mais, encore, il se serait élevé une difficulté: Comment la cour aurait-elle pu, sur contestation du rôle de cotisation, déclarer nul le rôle d'évaluation? La cour de Circuit n'a donc pas juridiction pour s'enquérir de la validité de ce rôle d'évaluation, et c'est ce que la cour de Révision vient de décider dans la cause McLaren vs La Corporation de Buckingham. Supra, p. 80. Les défendeurs ont d'abord plaidé par une défense en droit dont les raisons ont été déclarées insuffisantes; mais ils n'ont pas soulevé la question de juridiction, et, comme la cour a été d'opinion qu'elle était incompétente, ratione materia, il lui était impossible de procéder à juger le fond, et elle a, en conséquence, rendu, le 31 mars 1873, le jugement qui suit : " Considérant que la cour de Circuit n'a pas de juridiction pour s'occuper de la présente demande, la cour renvoie les parties à se pourvoir comme elles aviseront, sans frais." (17 $J_{\cdot, p}$, 192; 4 R. L., 684.)

DORION, DORION & GEOFFRION pour le requérant. VILBON pour les défendeurs.

CORPORATIONS MUNICIPALES.—RESPONSABILITE.

COUR DU BANC DE LA REINE, EN APPEL, Québec, 20 mars 1873.

Coram Duval, J. C., Drummond, J., Badgley, J., et Monk, J.

LOUIS DOYON, appelant, et LA CORPORATION DE LA PAROISSE DE SAINT-JOSEPH, intimée.

Jugé:—Que, dans une action en réintégrande, avec des conclusions demandant des dommages, l'avis d'un mois requis par l'art. 22 C. P. C. n'est pas nécessaire.

Qu'une Corporation municipale, est responsable des actes de ses officiers, si elles les a ordonnés, ou si elle essaie de les justifier.

Que, dans l'espèce, l'action en réintégrande étuit bien intentée, et que, dans tous les cas, ses conclusions contenant tout ce qui est nécessaire pour une action en complainte, elle aurait toujours été maintenue.

Que les formalités imposées par le Statut, pour l'ouverture d'un chemin, et pour l'expropriation des particuliers, doivent être suivies avec rigueur et à peine de nullité.

L'appelant avait porté une action en réintégrande, contre l'intimée, pour recouvrer la possession d'une partie de sa terre, dont la Corporation s'était emparée, en y ouvrant un chemin au public, et demandait, en outre, des dommages.

L'intimée produisit une défense en fait, et une exception, dans laquelle elle prétendit qu'elle avait agi en vertu d'un procès-verbal du conseil du comté de Beauce, en date du 24 juillet 1867, lequel ouvrait ce chemin, et ordonnait que les travanx fussent faits dans l'espace de trois ans. Elle prétendit ensuite, par le même plaidoyer, que les voies de fait en question avaient été commises à son insu, et qu'elle n'en était pas responsable: enfin, qu'elle avait la possession de l'an et jour du terrain en question, lequel formait partie des chemins de la Municipalité. L'appelant fit, de suite, motion, suivant l'art. 146 C. P. C., mais cette motion fut rejetée avec dépens. Il produisit alors des réponses spéciales, dans lesquelles il alléguait la nullité du procès-verbal en question: 1° Parce que le conseil du comté de Beauce, après avoir nommé un surintendant, pour faire ce procès-verbal, (lequel avait fait une visite des lieux, et avait refusé de continuer sa charge,) n'avait pas le droit de nommer un autre surintendant, tel qu'il l'avait fait; 2° Que le 1er surintendant était le seul qui pouvait agir. (Voir sect. 45 et 62 de l'acte de 1860. Voir aussi sect. 30 § 3); 3° Que le 2e surintendant n'avait pas donné les avis nécessaires, et que les avis donnés par le conseil de comté, pour l'homologation du procès-verbal, étaient insuffisants, l'un de ces avis avant été donné cinq,

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(2) Une pen vertu d'un et renvoyé, p dernier lui re dien d'office revendication. mages résulta ces effets; et c il soit ordonn dans la cause ; qui sera fixé p Boston et al., C., DUVAL J., WIN J., DUVA 27 octobre 1853 l'avis d'un moi Canada de 1850 tobre 1857, LA versant le jnge LET J., qui ava à cause du déf p. 397; 7 D.T.1

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et l'autre trois jours avant la séance, la loi exigeant sept jours d'avis. L'appelant prétendait, de plus, qu'en supposant que le procès-verbal fut régulier, l'intimée ne pouvait pas entrer sur son terrain; 1° Parce qu'il n'y avait pas eu d'estimation légalement faite de la valeur de son terrain; que les estimateurs qui avaient déclaré qu'il n'y avait pas lieu à accorder de compensation à l'appelant n'étaient pas légalement estimateurs, et que, dans tous les cas, il avait objecté à leur décision, et avait appelé de leur sentence, dans les délais voulus, et que, le 12 novembre 1869, jour des voies de fait en question, il n'y avait pas encore de décision sur ledit appel. La preuve établit la possession de l'appelant, et les voies de fait allégués. 1° L'intimée prétendit, d'abord, qu'elle aurait dû avoir un avis d'un mois de la présente poursuite, suivant l'art. 22 du C. de P. C., et cita à l'appui la cause de Jetté vs Choquette, (1) L'appelant cita en opposition la cause de Irwin vs Boston et al., (2) celle de Esinhart vs McQuillan, (3).

(1) Un inspecteur de chemins et ponts, dans une municipalité rurale, qui, de bonne foi, se croit autorisé, par la loi et un règlement du conseil municipal, à faire l'ouverture d'un chemin public, sur une propriété située dans la municipalité, et qui procède à ouvrir ce chemin, a droit à l'avis d'un mois mentionné dans le Statut du Canada de 1850, 14 et 15 Victoria, chap. 54, intitulé: "Acte pour amender et refondre les lois pour la protection de magistrats et autres, dans l'exercice de leurs devoirs publics," section 2 et 9, de la part du propriétaire du terrain sur lequel il procède à ouvrir le chemin, qui le poursuit en donnigaes; et ce, quoique, par la loi, ce ne soit pas le devoir de l'inspecteur d'ouvrir les chemins mais le devoir du grand voyer, et quoique le règlement sur lequel s'appuye l'inspecteur fut illégal. Ce défaut d'avis peut être invoqué au mérite, et cela suffit pour faire renvoyer la demande. (Jetté et Choquette C. B. R. en appel, Montréal, 12 mars 1857, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., et CARON, J., 7 D. T. B. C., p. 63; 1 J., p. 148, et 5 R. J. R. Q., p. 177.)

(2) Une personne dont les effets mobiliers ont été saisis par le shérif en vertu d'un bref de saisie-revendication, qui a ensuite été déclaré mal fondé, et renvoyé, peut procéder, par action, contre le shérif, pour obtenir que ce dernier lui remette les effets qu'il a ainsi saisis et mis sous la garde d'un gardien d'office incompétent, qui les aurait remis au demandeur sur la saisie revendication, ou à lui en payer la valeur, et, pour obtenir aussi les dommages résultant à cette personne, par ce défaut, de leur part, de lui remettre ces effets ; et ce, quoique, par le jugement renvoyant la saisie-revendication, il soit ordonné au shérif de remettre les effets à cette personne, défenderesse dans la cause ; et le shérif sera condamné à remettre ces effets, sous un délai qui sera fixé par le jugement, sous peine de contrainte par corps. (Irwin et Boston et al., C. B. R. en appel, Montréal, 12 mars 1855, LAFONTAINE J. en C., DUVAL J., et CARON J., et ler octobre 1857, LAFONTAINE J. en C., AVILWIN J., DUVAL J., et CARON J., renversant le jugement de C. S., Montréal, 27 octobre 1853. LAFONTAINE J. en C., AYLWIN J., DUVAL J., et CARON J., renversant le jugement de C. S., Montréal, 19 octobre 1856, DAY J., et MONDELET J., qui avait jugé que le shérif, dans ce cas, avait droit à cet avis, et qui cause du défaut de cet avis, avait renvoyé la demande. (5 D. T. B. C., p. 397; 7 D.T.B.C., p. 433, 2 J., p. 171, et 4 R.J.R.Q., p. 390 et 392.)

(3) Un particulier qui, prétendant agir sous les ordres de l'inspecteur des

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Cette prétention de l'intimée a été repoussée par les deux cours. 2° L'intimée prétendit ensuite que l'appelant ne pouvait pas obtenir les conclusions d'une action en réintégrande, et que les faits prouvés par lui ne pouvaient servir de base qu'à une action en complainte. Il était établi, en preuve, qu'on avait défait la clôture des deux côtés de la terre de l'appelant, et qu'on avait abattu les arbres et les ferdoches, sur une largeur de douze pieds, en y traçant un chemin, dans lequel on avait passé depuis; que ces travaux avaient été faits par l'inspecteur des chemins nommé spécialement pour faire ouvrir celui-ci, et à qui il avait été ordonné, par une résolution du 2 août 1869, de faire les travaux nécessaires à cet effet. L'appelant prétendait qu'il n'y avait pas une dépossession plus réelle que celle qui consistait à convertir son terrain en un chemin qu'on ouvrait ainsi à tout le public.

La Cour Inférieure adopta les prétentions de l'intimée, mais la Cour d'Appel a renversé cette partie du jugement, et déclaré que l'appelant avait, de fait, été dépossédé par l'intimée, et que, même dans le cas où la dépossession n'aurait pas eu lieu, l'action de l'appelant pouvait encore être maintenue, parce que ses conclusions contenaient tout ce qui est nécessaire dans une action en complainte. 3° L'intimée prétendait encore qu'elle n'était pas responsable des voies de fait commises par son inspecteur; que celui-ci n'est qu'un mandataire, et que du moment qu'il excède ses pouvoirs, il ne lie plus son mandant; que son devoir, si les travaux n'étaient pas faits, était de faire rapport au Conseil, et de se faire autoriser à les faire, et que, n'ayant pas pris cette précaution, et ayant agi de sa propre autorité, il ne pouvait pas rendre l'intimée responsable. L'appelant répliquait que le Conseil avait luimême ordonné que les travaux fussent faits, par sa résolution du 2 août 1869, et que l'inspecteur en question avait été nommé exprès pour faire ouvrir ce chemin, et que, si l'intimée était responsable des omissions de ses officiers, à plus forte raison, devait-elle être responsable des actes qu'elle commande et qu'elle ordonne. La Cour Inférieure avait aussi adopté l'avis de l'intimée, mais la Cour d'Appel a encore renversé cette partie du jugement. La question de la validité, ou de la nullité, du procès-verbal longuement débattue en la présente

chemins et ponts d'une paroisse, entre sur la propriété d'une personne de la municipalité, pour y ouvrir un chemin, n'a pas droit à l'avis d'un mois mentionné dans la section 2 du Statut du Canada, 14 et 15 Victoria, chap. 54, avant qu'on puisse intenter contre lui une action en dommages parce qu'il aurait agi sans autorité, ou sous les dispositions d'un procès-verbal ou d'un règlement nul. (Esinhart et McQuillan C. B. R. en appel, Montréal, 12 mai 1854, LAFONTAINE J. en C., AYLWIN J., DUVAL J., et CARON J., renversant le jugement de C. S., Montréal, 16 D. T. B. C., p. 456, et 5 R. J. R. Q., p. 133.)

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cause, devant les deux cours, a été décidée dans le sens des prétentions de l'appelant en appel. Telle était aussi l'opinion de la Cour Inférieure, quoiqu'il n'en soit pas fait mention dans son jugement. Il a été clairement déclaré que les formalités imposées par le statut doivent être suivies rigoureusement, et que, lorsque la loi prescrit qu'une chose sera faite d'une certaine manière, il est, non seulement, de l'intérêt et de l'avantage de tout le monde de se conformer à ses. prescriptions; mais tout ce qui sera fait en violation de ces prescriptions sera considéré comme une nullité. La Cour Supérieure, présidée par l'hon. J. N. Bossé, avait rendu, le 13 juin 1872, le jugement suivant: "La Cour, considérant qu'il résulte de la preuve faite par le demandeur que, dans le mois de novembre 1870, Louis Jacques, et quelques autres individus, sont entrés sur la terre du demandeur décrite en la déclaration, y ont abattu trois ou quatre épinettes, arraché les arbustes qui s'y trouvaient, dans environ douze pieds de large, sur la largeur de la terre du demandeur, et ont aussi défait trois ou quatre pagées de clôture de ligne, et ont ensuite laissé le tout dans le même état, n'y sont jamais retournés depuis, sans qu'il soit prouvé, ni même prétendu, que le demandeur ait été dépossédé, ni aucunement dessaisi du dit terrain; Considérant que les dites violences sont des voies de fait, qui constituent bien, en loi, un trouble qui aurait pu donner lieu à une action en complainte, dont l'objet aurait été, de la part du demandeur, d'être maintenu dans la possession du terrain sur lequel a eu lieu le trouble dont il se plaint, mais ne peuvent donner lieu à une action en réintégrande, par laquelle, il demande que la défenderesse soit condamnée à lui rendre cette dite partie du dit terrain, et à être réintégré dans la possession paisible d'icelui, pendaut qu'il n'a jamais perdu cette possession ni la saisine dicelui; Considérant, de plus, que les voies de fait dont se plaint le demandeur sont des violences commises par Louis Jacques, qui, bien qu'inspecteur de chemins pour la localité dans laquelle se trouve le terrain en question, ne paraît cependant pas avoir agi dans la circonstance par l'ordre immédiat de la défenderesse, qui ne paraît pas en avoir pris la responsabilité. La Cour déboute, etc., avec dépens." Cour d'Appel renversa ce jugement.

Voici son jugement. "La Cour, considérant que l'appelant a prouvé les allégations principales de son action, et, notamment, que l'intimée s'est, illégalement, emparé de l'étendue de terre appartenant à l'appelant, et désignée en sa déclaration, et la détenait malgré lui, et à son préjudice, lors de l'institution de l'action de l'appelant, tel qu'allégué en la déclaration de l'appelant; Considérant que l'intimée a failli de prouver les allégations de sa défense, et, de plus, que le procès-verbal.

en date du 24 juillet 1867, en vertu duquel elle s'était emparé et mis en possession du terrain de l'appelant, pour l'utiliser comme chemin public, n'a pas été précédé des formalités nécessaires pour le rendre valable, et qu'en autant le procèsverbal est nul; Considérant que, dans le jugement de la Cour Supérieure, rendu à Saint-Joseph, dans le district de Beauce, le 13e jour de juin 1871, il y a erreur, en ce que, par ledit jugement, l'action de l'appelant est renvoyée, cette Cour casse et annulle ledit jugement, et, rendant le jugement que ladite Cour aurait dû rendre, renvoie la défense de l'intimée, et la condamne à rendre et restituer ladite partie de terre à l'appelant, et défense est, par le présent, faite à l'intimée de ne plus molester ni troubler l'appelant dans la possession du dit terrain, ou d'aucune partie d'icelui, et, de plus, condamne l'intimée à payer à l'appelant, par forme de dommages, la somme de dix piastres, avec intérêt de ce jour, et condamne l'intimée à payer à l'appelant tous les frais dans les deux Cours." (17 J., p. 193; 4 R. L., p. 684)

BLANCHET et PENTLAND, procureurs de l'appelant.

E. Vézina, procureur de l'intimée.

PROCEDURE IN NON APPEALABLE CASES OF CIRCUIT COURT.

CIRCUIT COURT, Montreal, 9th May, 1873.

Coram BEAUDRY, J.

LUSHER vs PARSONS.

Held:—That in cases in the Circuit Court, under \$60, a deposit is required with preliminary pleas.

2. That in such cases copies of these pleas must be served on the

plaintiff's attorney. (1)

This was an action for the recovery of \$41, and defendant fyled an exception à la forme, alleging certain informalities in the writ and copy. The plaintiff moved to dismiss the exception, on a number of grounds, the two last being that there was no deposit made with the exception, and that no copy had been served on plaintiff's attorney. The Court granted plaintiff's motion, on the last two grounds, and dismissed the exception. (17 J., p. 196)

L. H. DAVIDSON, for plaintiff. F. J. KELLER, for defendant.

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⁽¹⁾ Vide Contra: Desjardins vs Chrétien, Torrance J., 15 L. C. Jurist, page 56, and 21 R. J. R. Q., pp. 152, 538, and Alie vs Hamelin, Loranger, J., 14 L. C., Jurist, page 134, 20 R. J. R. Q., pp. 40 et 535.

CHEQUES .-- PRAUD.

COURT OF REVIEW, Quebec, 16th January, 1873.

Coram Polette, J., Taschereau, J., Dunkin, J.

LA BANQUE NATIONALE, plaintiff, vs The CITY BANK, defendant, and the CITY BANK, plaintiff en garantie, vs The BANK OF MONTREAL, defendant en garantie.

Held:—That cheques fraudulently initialed as accepted by the manager of a Bank, and for which the drawer has given, in exchange, to the manager, certain securities which the Bank retains, cannot be repudiated by the Bank, when the cheques are held by a "bona fide" holder for value.

This was a hearing in review of a judgment rendered in the Superior Court, at Quebec, by STUART, J., 7th June, 1872. The action was in warranty, against the Bank of Montreal, to guarantee and save harmless the City Bank, against a demand of the Banque Nationale for \$95,000, amount of four cheques drawn by Edward Sanderson, upon the Bank of Montreal, accepted by the latter, and placed to the credit of the City Bank, in its deposit account with the Banque Nationale, upon an alleged undertaking of the City Bank to refund the amount of the four cheques, if not paid. The defence to the action was that Harris, the manager, who accepted the cheques for the Bank of Montreal, by placing his initials P. P. H. on them, had no authority to do so, and that there was collusion between the officers of the City Bank and Harris, to supplement an overdrawn account of Sanderson with the Bank of Montreal, by means of the four cheques.

The case of the City Bank was argued by OKILL STUART, Q. C., and D. A. Ross: The facts, as submitted for plaintiff. were that, on the 14th Sept., 1869, the Bank of Montreal had its branch at Quebec; -that Harris, for about three years before, had been manager of it, preceded by Christian, for about two years. San lerson was the broker of the Bank of Montreal, and kept a general deposit account at the Branch. Overdrafts of Sanderson, on this account, had been allowed by Christian, as manager, in matters of exchange and silver purchased for the Bank, by placing his initial C. on them, and, afterwards, by Harris, as manager, who placed his initials P. P. H. on them, when the account was overdrawn by Sanderson for his general business. The Ledger of the Bank of Montreal, at a glance, indicated every overdraft. In 1867, and in 1868, Harris being then manager, the account of Sanderson was inspected by Christian, then inspector, and no

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fault was found with these overdrafts by the head office, at Montreal, to which Christian made his reports. Previous to the 16th Sept., 1869, for a whole year, the certified cheques of Sanderson, to the amount of from three to four daily, in the aggregate, amounting to a large sum, initialed P. P. H., passed through the Banque Nationale alone, and were paid daily by the Bank of Montreal. Observing this practice, the cashier of the Banque Nationale went to ascertain if it was correct, and was informed by Harris, at the Branch, that it was. This was about six months before the 14th of September. The City Bank had no branch at Quebec, but employed McGie, as agent, for the special purpose of circulating its notes there, by giving them in exchange for cheques and drafts obtained from the community at large, and depositing them in the Banque Nationale, in the deposit account kept there for the City Bank, against which McGie had authority McGie had for his clerk, Ahern, to whom was entrusted the pass book, and a blank cheque book, each blank cheque in it signed by him, leaving to Ahern the filling up of the cheques as "City Bank Agency" cheques, when required for the purpose of circulating the City Bank notes. On the 13th September, 1869, Sanderson obtained from Ahern, one of the "City Bank Agency" cheques filled up over McGie's signature for \$17,000, and gave, in exchange for it, a cheque of his own, accepted by Harris, on the Bank of Montreal, also for \$17,000. The "City Bank Agency" cheque was received by Harris, and placed to the credit of Sanderson's account in the Bank of Montreal. Harris then sent it to the Banque Nationale, where it was paid and debited to the City Bank. The next day (14th September) Sanderson obtained a second "City Bank Agency" cheque filled up over McGie's signature, by Ahern, for \$18,000, and gave for it a cheque of his own accepted by Harris, on the Bank of Montreal, for \$18,000, and this "City Bank Agency" cheque so given for the last mentioned cheque of Sanderson, was also received by Harris, placed by him to the credit of Sanderson, in his deposit account with the Bank of Montreal, and then sent by him to the Banque Nationale, where it was paid and debited to the City Bank, in its account there. On the same day (14th September) a third "City Bank Agency" cheque, for \$17,000, filled up by Ahern, over McGie's signature, was obtained by Sanders on from Ahern, for which he gave his own on the Bank of Montreal, for \$17,000, accepted by Harris, and this "City Bank Agency" cheque was also received by Harris, placed by him to the credit of Sanderson, in his deposit account with the Bank of Montreal, and then sent to the Banque Nationale, where the Bank of Montreal received the amount. On the afternoon of the 14th September, Christian, then the

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mount. en the inspector of the Bank of Montreal, arrived at the branch, at Quebec, for the purpose of examining the deposit account of Sanderson. Upon his arrival, he looked at it, and saw that it was overdrawn, and, at the same time, he said to Harris that he knew what he came for, and hoped to find matters all right. Harris immediately sent for Ahern, and obtained from him, over McGie's signature, three drafts on the City Bank of Montreal, for the sum of \$43,000, about the sum for which Sanderson's account was overdrawn. He then went to the Bank Ledger, and erased the letters Dr. and Cr., changing their places, and, by entering the \$43,000 received from Ahern, in drafts, which he wrote over an erasure, he converted the debit seen by Christian into a credit. This was observed by Christian, at the opening of the Bank, on the morning of the 15th September, when he received from Harris the three drafts received from Ahern making up the \$43,000. On the same morning, Ahern applied to Christian to exchange them for "City Bank Agency" cheques on the Banque Nationale at Quebec, to which Christian assented. This agreement between Christian and Ahern was carried into effect only in part, as but one "City Bank Agency" cheque, on the Banque Nationale, in exchange for one of the drafts, was filled up for \$18,500, and given by him to Christian, and this was paid also to the Bank of Montreal, on presentment at the Banque Nationale. The two remaining drafts which were made payable by Ahern, to the order of the Manager of the Quebec Branch, were endorsed by him, and paid by the City Bank to the Bank of Montreal, in Montreal. The total of City Bank moneys thus received by the Bank of Montreal on and previous to the 15th September, amounted to \$95,-000. These moneys were taken from funds at the credit of the City Bank, to facilitate the circulation of its notes, without its knowledge, but with the knowledge of Harris, acting as the manager of the Branch of the Bank of Montreal, on and previous to the afternoon of the 15th September. The four cheques of Sanderson, mixed up with other monies, but shewn on bordereaux, were deposited to the credit of the account of the City Bank with the Banque Nationale. Shortly after receiving the last portion of the consideration for the cheques of Sanderson, viz.: the above mentioned cheque for \$18,500, the Bank of Montreal being then secured, as Christian imagined, he went over to the Banque Nationale, and intimated to their cashier that the cheques of Sanderson, accepted by Harris, would not be paid. This was between two and three o'clock in the afternoon of the 15th Sept. The cashier, Vezina, immediately sent for Ahern, and went with him to the office, in the Branch, always occupied by the manager, where Harris, seated in the

manager's chair, notwithstanding the interposition of Christian to prevent him, admitted the initials on the accepted cheques to be his. Ahern then expressed his surprise to Christian at the refusal of the Bank of Montreal to pay its acceptances after he himself, Christian, had, a short time before, on that morning, received from him (Ahern) the \$18,500, a part of the consideration for which the last Sanderson cheque was given, and to this Christian made no answer. Upon this statement, the City Bank contended that Harris had the power to certify cheques as good, by virtue of his office, as well as from the usage prevalent in the commercial community, as part of the law of merchants. The custom to certify cheques, by the cashier, had been abundantly proved, and, when certified, that they passed as freely as the notes of circulation of the Banks, and had always been received as money in their daily exchanges. The certification of cheques is so essential to commerce, at the present day, that, in large commercial cities, where hundreds of millions pass daily through the banks, it is impossible to do the necessary amount of business without it. This has been felt in the United States, where the inherent power, in a cashier, to certify cheques was for many years questioned; but now, by a recent decision of the Supreme Court of the United States, in the case of The Merchants' National Bank against The State National Bank, the question has been finally settled, by the latter bank being condemned, so recently as in December, 1870, to pay to the former a sum of \$600,000, the amount of three cheques certified by their cashier. The Court, in that case, said in relation to the authority of a cashier: "It is his duty to 'receive all the funds which come into the Bank, and to en ter them upon its books. The authority to receive implies and carries with it the authority to give certificates of deposit, and other proper vouchers When the money is in the bank he has the same authority to certify a cheque to be good, charge the amount to the drawer, appropriate to the payment of the cheques, and make the proper entry on the books of the bank. This he is authorized to do virtute officii. The power is inherent in the office." But it is said, on behalf of the Bank of Montreal, there is an Individual Ledger Keeper in all the Banks, whose business it is to certify cheques before they go into circulation. An answer to this is to be found in the opinion of the Court already referred to. "The cashier is the executive officer, through whom the whole financial operations of the Bank are conducted. He receives and pays out the monies, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his di-

rection. portions may be in itself. same this deem pr limitation managem the pract ticularly, tice and u also for n tian made to the Bo things do seems to h Montreal, of examir have offer they charg drafts by doing wron its disappr 500 of Cit of the cheq real has ap remains un account of Harris upor to certify, t cashier, the Baron Parl law with ce that depend in different and duties i

 rection, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify cheques, but this, in itself, would not effect the right of the cashier to do the same thing. The Directors may limit his authority, as they deem proper, but this would not affect those to whom the limitation was unknown." It is difficult to imagine that the management, at the head office, in Montreal, were unaware of the practice of Christian and Harris to certify cheques, particularly, as cashiers, in Montreal, do the same thing. A practice and usage, as in Sanderson's case, has prevailed in Quebec also for many years. The Bank of Montreal Inspector Christian made his reports of inspection, and must have conveyed to the Board of management, at Montreal, information of all things done at the respective branches. Sanderson's overdraft seems to have been known to the Board of management, at Montreal, as they sent down Christian for the express purpose of examining it. Why it came to this determination they have offered no evidence to show. It does not appear that they charge Harris with doing wrong, for allowing the overdrafts by Sanderson; nor does it charge Sanderson with doing wrong in overdrawing. There is nothing, either, showing its disapprobation of its officer, Christian, when he took \$18,-500 of City Bank monies direct from Ahern, and the balance of the cheques for \$43,000 from Harris. The Bank of Montreal has approved, also, of the alteration in the Ledger, as it remains unchanged, and its own officers have balanced the account of Sanderson with the changes, by erasure made by Harris upon it. Apart from the inherent power in a cashier to certify, the usage is binding on the Bank of Montreal. A cashier, the offspring of modern commerce, is, as stated by Baron Parke, of bill-brokers, not a character known to the law with certain prescribed duties, but his employment is one that depends entirely on the course of dealing. It may differ in different parts of the country. The nature of these powers and duties is a question of fact, and is to be determined by the usage and dealing in the particular place.

HOLT, Q. C., for the Bank of Montreal: The case of the City Bank was not of the favorable character ascribed to it. The case exhibited the following facts: that, in 1862, McGie was doing business as a general agent, for assurance companies and others, and that, as such agent, he had an account in the Banque Nationale, under the heading "Daniel McGie, agent." As part of his business, he had to redeem the notes of circulation of the City Bank. Matters went on till 1869. He had in his pay Ahern, who indulged in speculations. Sanderson, through the weakness of Harris, was allowed to

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overdraw. Without imputing criminality to Harris, he permitted Sanderson to overdraw, and it was by means of Ahern that the overdraft was kept up. Ahern had access to blank cheques, in McGie's drawer, so that, when returns were made to Montreal, the accounts were made correct. Ahern goes to the drawer, takes out a draft of McGie's, fills it up, and receives Harris' acceptance for the amount. For a few hours, Sanderson had, perhaps, \$35,000 to his credit, covering the deficiency, from time to time, by the agency of Ahern. If you, the City Bank, gave opportunities to Ahern to get these cheques, you are the cause of our loss. It so happened that, when this course was interrupted, the balance was in our favor, so that the Bank of Montreal is not without strong moral grounds. We say to the City Bank, this is your act, and you are answerable. But what proof is there, in support of this action? Why are we the garants of the City Bank? The warranty must be founded on something. The case set out, in plaintiff's declaration, is that Sanderson, on the 13th September, 1869, drew a cheque on the Bank of Montreal, for \$17,000, payable to bearer, which the Bank of Montreal accepted; that Sanderson delivered the cheque, so accepted, to the City Bank, for value received, and the City Bank transferred and delivered it to the Banque Nationale. The same allegations are made as to the three other cheques, and the declaration then states that the cheques were protested, that the City Bank was sued by the Banque Nationale, in an action for the amount of the four cheques, and, therefore, the Bank of Montreal was bound to indemnify and keep harmless the City Bank, against this demand. Looking at the case without reference to the special plea of the Bank of Montreal, it is submitted that plaintiffs have failed to make out their demand in evidence, viz., the acceptance of the cheques by the Bank of Montreal, the delivery of them, by Sanderson, to the City Bank, and by the City Bank, to the Banque Nationale. The proof of the City Bank is not in accordance with these allegations. however much it may appear to support a possible claim of the City Bank put in another shape. The salient points to be kept in view, for the purpose of this argument, are assumed by the Bank of Montreal: 1st. Donald McGie carried on business, as a general agent, for insurance, as a wharf-holder. for private individuals, and as agent of the City Bank. at Quebec, in so far as respected the circulation of its notes there. As a general agent, McGie kept a deposit account with the Banque Nationale, and that account was not the account of the City Bank. It is true that, in the principal suit of the Banque Nationale, the jury have found that the

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account of McGie, in the Banque Nationale, was the City Bank account, but, in this case, it will be shewn that it was the account of McGie. McGie states that it was an ordinary deposit account, upon which he alone had a right to draw. that he paid into this account all insurance premiums, and other monies he had to deposit, including the funds of the City Bank; he says, also, the City Bank never recognized Edward H. Ahern as their clerk or agent. The only account in the name of the City Bank was a circulation account between the two banks, settled daily. A copy of the bill of particulars, on which the principal demand is brought, by the Banque Nationale, against the City Bank, is headed: "The City Bank, Dr," and is fyled in the suit. This heading is probably in accordance with the view which the Banque Nationale takes of this account, but it is at variance with the statements of McCine and his son, and of Paquet, the accountant of the Banque Nationale. The City Bank, in answers on facts and articles, state that they were not cognizant of the deposit account, until about the 18th Sept., 1869, and were then led to believe that it had been exclusively a City Bank account, which subsequent enquiry shewed to be incorrect. The City Bank did not recognize the deposit account, and McGie never saw the cheques until produced in Court. The facts show that Sanderson had, in an irregular way, obtained the initials of Harris, the manager of the Quebec Branch of the Bank of Montreal, upon the four cheques, there being no funds to meet them, he handed them to Ahern, who deposited them to the credit of McGie, in the Banque Nationale. The obtaining and depositing of the cheques, in the Banque Nationale was not a matter of business, but part of a system of accommodation, between Sanderson, Harris and Ahern. The City Bank knew nothing of it. McGie, their agent, knew nothing of it. In receiving the cheques from Sanderson, Ahern neither actually nor constructively represented the City Bank, for they never knew or recognized his acts. There is, therefore, no pretence for saying that Sanderson delivered the cheques to the City Bank, or that the City Bank delivered them to the Banque Nationale. Even supposing that Ahern gave, in exchange for the cheques, gold, bank notes, or blank cheques filled up by Ahern, or money taken from the City Bank till, in McGie's office, that would not make the City Bank a party to the reception of the cheques delivered to Ahern, a person not acting for the City Bank, and deposited by him to the credit not of the City Bank, but of McGie. Upon our plea, we shall submit the following propositions: That the account of Sanderson had been considerably overdrawn, previous to

Sept., 1869; that Harris, the manager, and Ahern, clerk of McGie, had, with Sanderson, been carrying on a system of a concealment of the overdrafts; that the account was overdrawn on the 13th Sept., when there were no funds; that the Bank of Montreal had an officer appointed, for the special purpose of certifying cheques, the individual ledger-keeper, and the paying-teller could pay no cheques, unless accepted by him; that this ledger-keeper, sometimes, accepted a cheque upon an order of the cashier, and, thereby, enabled the holder to obtain payment from the teller. The cashier gives instructions to the ledger-keeper to accept, under special circumstances, in the use of his discretion. That it is not customary for ledger-keepers of banks to accept cheques for which there are no funds, nor is it customary for the cashier of the Bank of Montreal to accept such cheques. That the cheques in question were given and taken to conceal the overdrawing. The covering of Sanderson's overdraft was for an immoral purpose. Ahern had notice of Sanderson's over-The cheque for \$43,000 was given in Sanderson's office, to cover the account, and it is uncertain where the other cheques were given. Ahern knew there were no funds, and Harris made up the bordereaux. Ahern is, therefore, responsible for the disaster. But, it is said that the overdrafts are admitted, and known to the Bank of Montreal, through Christian, who saw them, when he inspected the books in 1867 and 1868, but a bank is not responsible for anything overlooked by one of its officers. Then, as respects the power of a cashier to certify cheques, the cases in the United States have been conflicting. A cashier does not bind 'a bank, if he does not act within the scope of his authority, and his authority is analogous to that of the master of a vessel, whose signature to a bill of lading does not bind the owner, if the goods are not on board. The Bank of Montreal contends that it is not answerable for the negligence of its inspector, or for the acts of Harris. It is further urged that plaintiffs have not proved the principal suit to be pending, and that the case is not, by the evidence, made out against Sanderson.

OKILL STUART, Q. C., in reply: With reference to the deposit account, with the Banque Nationale, Vezina, the Cashier, swears that McGie's account with it is the account of the City Bank, and that McGie, as agent for the City Bank, agreed with him that it should be and was the City Bank account. It is said that the Jury, in the principal suit, have found that it was the deposit account of the City Bank, but that, in this case, the Court must say that it was not. Although, in one sense, it might not be, strictly speaking,

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an account confined to City Bank monies, yet, it contained all their monies received by McGie for that Bank, and the "City Bank agency" cheques, given for Sanderson, were drawn against those monies, and paid out of them. McGie had, in his books, a separate account for each of his agencies, and the cheques were drawn against the amount belonging to each. Besides, if cheques were drawn by the City Bank agency, without any deposit account at all, and were paid without any funds to meet them, the credit being given to the City Bank, the latter would be liable for the amount of them, and this would be value, when given in exchange for an equal amount of other cheques or drafts. The bill presented to the City Bank, headed "City Bank, Dr," in which these cheques are debited, is a demand on the City Bank for so much money paid upon these cheques, and it is sufficient that the City Bank has shown that these cheques were received by the Banque Nationale, as drawn by the City Bank and paid. But it is said that Ahern was not an officer of the City Bank. This is true, but he took the City Bank money, and, acting in the name of that Bank, he applied it, unknown to the City Bank, and purchased securities intending to apply them, and did apply them to the use of the City Bank with the Banque Nationale, with its consent. It would be very extraordinary if the City Bank, after discovering this, could not avail itself of the substitutes for its own money, which it has done by acquiescing in the deposit of the four cheques to its credit in its account with the Banque Nationale. Then, take the last cheque for \$43,000; it was paid for by three drafts on the City Bank, at Montreal, so that value was given, out of City Bank funds, for it, and the deposit account has nothing to do with it. The consideration for the first three acceptances of Harris, on behalf of the Bank of Montreal, was cheques for a similar amount, drawn on behalf of the City Bank, on the Banque Nationale, and this amount has actually been paid and received by the Bank of Montreal. The consideration of the fourth acceptance was in ances drafts for Montreal, for one of which, a cheque of the City Bank, on the Banque Nationale, was substituted, the amount of all which drafts and cheque has, in like manner, been paid and received by the Bank of Montreal, and that Bank now attempts to repudiate their acceptances, to retain the money which they received, on the faith of them, and apply that money to an overdrawn account of Sanderson. Christian assumed the control of the branch, at Quebec, on the 15th September, and, in the morning of that day, after receiving the drafts and cheque amounting to \$43,000 notified

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Vezina that the acceptance of Harris would not be paid, and this with a full knowledge of what had been done. If his plan of taking the money, without paying the acceptances, were successful, the money thus obtained from the City Bank would be applied to the liquidation of a debt of Sanderson due to the Bank of Montreal, in which, neither the City Bank nor even Ahern or McGie had the slightest interest. The Banque Nationale have an undoubted right of action against the Bank of Montreal, the acceptor of the four cheques; their acceptance was an engagement, as, in every case of acceptance, to pay the amount upon presentment of the cheques, and, in default of payment, by the Bank of Montreal, then, and then only, ought the Banque Nationale have attempted to enforce a liability against the City Bank or other party. The device of the Bank of Montreal, to obtain \$95,000 of the City Bank money, and then repudiate the acceptance on which they obtained it, is no doubt ingenious, and, however questionable the morality of the act may be, there can be no question as to its being legally bound to fulfill its engagements and guarantee the

City Bank. The remarks made by STUART, J., at Quebec, on the 7th June, 1872, maintaining the action en garantie, were as follows: "The present is an action en garantie simple, by which plaintiff en garantie prays that defendants en garantie may be condemned, jointly and severally, to intervene in a suit now pending and undetermined in this Court, brought by La Banque Nationale, against plaintiff en garantie. and to cause such suit to be dismissed, withdrawn or discontinued, in so far as respects a claim of \$95,000, amount of four cheques, one for \$17,000, dated 13th September, 1869. one for \$18,000, dated 14th September, 1869, another of same date, for \$17,000, and the fourth of the same date for \$43,000 amounting in all to said \$5000, drawn by defendant en garantie, Sanderson, on the Bar. of Montreal, and accepted by it, and, in default thereof, that the defendants en garantie be adjudged and condemned, jointly and severally, to guarantee, indemnify, and save harmless plaintiff en garantie from any judgment which may be rendered in the suit. The facts which have given rise to the present litigation are the following: The Bank of Montreal, as it is well known, for very many years has had a branch established in Quebec, which, in the year 1869, and for some years previously, was under the management of Harris. Sanderson, the other defendant en garantie, was then, and had been for a long time, a customer of the Bank of Montreal, and the extent of his banking transactions may be judged of by the fact that

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there passed through the City Bank and La Banque Nationale, during the year immediately preceding the month of September, 1869, cheques of Sanderson, on the Bank of Montreal, accepted by Harris, as manager, to an amount exceeding a million of dollars, and the evidence leaves it to be inferred that other cheques of the same kind were negotiated by other banks in this city, during the same period of time. It is proper to explain how Sanderson's cheques found their way into the City Bank and La Banque Nationale. The former of these banks, desirous of promoting the circulation of its notes in Quebec, established McGie as their agent, for that purpose, and authorized him to make an arrangement with La Banque Nationale, to open a deposit account with it for the City Bank, and also to redeem the City Bank notes; the accommodation of a deposit account was highly useful, if not indispensable to the efficient circulation of the City Bank notes, in the manner contemplated. The description of business that McGie did for the City Bank was that of cashing, in City Bank notes, cheques drawn on other banks after the usual banking hours, thus affording to the commercial community the facilities of a bank, for several hours each day, after three, when the doors of all banks were closed. The understanding of McGie with La Banque Nationale was that the City Bank should always have to the credit of its deposit account \$2,000, or \$3,000, and should redeem, latterly, daily, the City Bank notes by means of bills of other banks, or by drafts upon the City Bank at Montreal, payable in gold. In the fulfilment of his agency, McGie, every morning, Fund himself worth a greater or less number of cheques which he had cashed the previous day, some unaccepted, and others accepted by the banks on which drawn. These cheques he deposited every morning in La Banque Nationale, and their amount was carried to the credit of the deposit account, and he further redeemed all City Bank notes held by Le Banque Nationale. This continued for several years, with complete satisfaction on both sides. It was in this manner that, almost daily, for a year previous to September, 1869, the accepted cheques of Sanderson, on the Bank of Montreal, were cashed by McGie, and deposited in course in La Banque Nationale. which presented all these accepted cheques for the enormous sum already mentioned to the Bank of Montreal, and received from it payment in due course. It is fitting to mark that the frequency and the importance of the amount of these accepted cheques of Sanderson induced Vezina, the manager of La Banque Nationale, six months before the acceptance of the cheques in question, to call at the Bank of

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Montreal, and inquire if everything was correct, about these accepted cheques, and if they would be honored. He received an affirmative answer from Harris, and, in truth, all of such acceptances, down to the 15th September, 1869, were paid by the Bank of Montreal, to La Banque Nationale, on presentation of the cheques. On the 13th September, 1869, one of these accepted cheques for \$17,000 was cashed, in the usual way, by McGie's clerk, Ahern, and deposited the next morning in La Banque Nationale. On the 14th Sept., 1869, Christian, the Inspector of the Bank of Montreal, reached Quebec, about 3 o'clock in the atternoon, having been despatched by the head institution, from information which it had received, to inquire into Sanderson's account, and he immediately proceeded to the Bank of Montreal, in this City. where he informed the manager that he had been sent to inspect the Bank, and, without further loss of time, looked at the account of Sanderson in the books; he found, from this inspection, that it was largely overdrawn, but made no observation on the subject. It having become known that there was to be an inspection of the Bank, Harris, the manager, Ahern, McGie's clerk, met Sanderson at his office, and it was then thought fitting for Harris to cover the overdraft of Sanderson, by monies to be furnished by Ahern, belonging to plaintiff en garantie, upon the security of Sanderson's cheques, on the Montreal Bank, accepted in the usual way by Harris, and, accordingly, a cheque for \$17,000. another for \$18,000, and a third for \$43,000, was drawn by Sanderson, on the Bank of Montreal, accepted by Harris, and by him handed to Ahern, who then gave to Harris, for these acceptances, a like amount of the monies of plaintiff en garantie, consisting of cheques on La Banque Nationale, and drafts on the City Bank, at Montreal. Ahern then deposited these accepted cheques, in the usual way, with La Banque Nationale, the following day, which gave credit to the City Bank for the amount. McGie reposed implicit confidence in his clerk, Ahern; indeed, to the extent of always leaving with him cheques on La Banque Nationale, signed by him in blank, with authority to fill them up; and also blank drafts on the City Bank of Montreal, with a like power to fill them up, so that Ahern had, at all times, the power in his hands to draw out any amount of the funds of the City Bank, if he had chosen to betray the confidence reposed in him, hence, it was in his power, without any reference to McGie, to use the funds of the City Bank, in the way he did on the 14th September, and the record establishes McGie's total ignorance of this transaction. It need not be said that the City Bank were ignorant of it, as it could only

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have derived its knowledge from McGie. The City Bank, through McGie, checked out of the Banque Nationale, the amount of the four cheques amounting to \$95,000. When La Banque Nationale presented these cheques for payment at the Bank of Montreal, they were refused, and were thereupon protested, hence, the suit brought by La Banque Nationale. against the City Bank for \$95,000, amount of these cheques credited to it and drawn out. The Bank of Montreal plead to the present action that Harris, its manager, had no authority to accept cheques, that Sanderson had no funds in the Bank, was largely indebted to it, on an overdrawn account, that no consideration, or value, was given to the Bank of Montreal. for these acceptances, and that these acceptances were not given on the Bank premises, during business hours, that there was an officer called the ledger-keeper, whose exclusive duty it was to accept cheques, and that it was no part of Harris' duty, that Sanderson, Harris, and the City Bank. intending to defraud the Bank of Montreal, were in the habit of covering and concealing Sanderson's overdrafts. These are the principal grounds on which the Bank of Montreal hold that the acceptances are not binding on it, and that, therefore, it is not liable to plaintiff en garantie. In so far as the defence rests upon Sanderson having no funds in the Bank of Montreal, of his being largely indebted to it, on an overdrawn account, on any concert to prevent such indebtedness being discovered, these facts, if established, would have no effect. one way or the other, on the decision of this case. The acceptances in question, if authorised, are acts by which the Bank of Montreal evinced its consent to comply with, and be bound by the request contained in the cheques directed to it; in other words, it is an engagement to pay the amount of these cheques to the bearer of them (Chitty, on Bills, page 307,837). Such an acceptance is not revocable, and the acceptor cannot be discharged, otherwise than by release or payment. It is vain to invoke reasons, good in themselves, for not accepting, to an actual acceptance All of the facts pleaded were within the knowledge of Harris, who had reasons for not deeming them sufficient to withhold from Sanderson the accommodation he required, and which had been, so frequently before, extended to him, and for such large sums; this part of the plea may be passed over without further observation. The facts of real weight pleaded by the Bank of Montreal are the absence of authority in Harris to accept cheques, and that no consideration or value was paid by plaintiff en garantie to the Bank of Montreal. It is urged, on behalf of plaintiff en garantie, that the authority of Harris to accept the cheques in question is incident to his office of manager of the Bank of Montreal, and that there is a usage and custom, among banks in this Province, of permitting their customers to overdraw their account, upon the authority of the manager, and in his discretion, by his initialing or accepting such customers' cheques. This usage or custom appears to be established in evidence, and to be general with banks, whenever a short credit is intended to be given to a customer. The strongest language is used by some of the witnesses, and among them, managers of banks, to the effect that such acceptances give to the cheques the same currency and value as the notes of the bank itself, whose manager has accepted. Such a usage in one bank, if not persued in another, would, in the competition for business, operate greatly in favor of the bank giving the accommodation, and to the prejudice, in fact, of such as did not. Such a usage, if at all general, makes its adoption by other banks a matter of business necessity. In this instance, the fact of Sanderson having no funds in the Bank of Montreal at the time, brings him within the category of persons requiring a credit, and who obtained it from Harris by his initialing his cheques. If he had the power, the Bank of Montreal is bound by the acceptance, whether it was judiciously given or otherwise, and whatever the motive, particularly in the hands of La Banque Nationale, which gave value for them. But Harris is not the only manager of the Bank of Montreal that has exercised this power. It appears probable that Christian, the manager preceding Harris, gave Sanderson his initials to cheques in the same way; but though this is not perfectly clearly established, it is well proved that Henry, the manager who succeeded Harris, accepted the cheques for customers by his initials, and that such cheques were duly paid. So that the power denied to Harris in the pleadings was permitted to be exercised at all events by Henry, after the difficulties in question in this cause had arisen, and were the subject of litigation. I incline, therefore, strongly to the opinion that the usage among banks, of granting credit to their customers through their managers, exercised in the way it was in this case, is proved, and that such was the usage with the Bank of Montreal itself, so that the public, left to infer the power of managers by the exercise of such powers, would seem to require to be protected by holding the Bank bound by the act. But it is further urged by plaintiff en garantie that whatever the power of the manager, under the general usage and custom of banks, Harris must be presumed to have had the authority of the Bank of Montreal to accept Sanderson's cheques, from the public exercise of that power, for so long a time as that proved, and for so many and such important transactions with what must be held to

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be the assent and acquiescence of the Bank of Montreal, it having a knowledge, or the means of acquiring a knowledge, of the circumstances of the case, (Dunlap's Agency, p. 771,) for what better evidence of the knowledge, and consequently, of the assent and acquiescence of the Bank of Montreal, in this mode of granting credit to Sanderson, than the transactions being regularly entered in the books of the Bink, and these shewing, as Christian swears, in his evidence in this case, that Sanderson had been permitted to overdraw his account a hundred times and more? The Bank of Montreal cannot plead ignorance of the contents of the books of that institution, and, hence, with a knowledge of the circumstances of Sanderson being allowed to overdraw, the Bank by not objecting to it, has adopted the acts of their manager and is bound by them. It follows that the authority of Harris, to accept the four cheques in question, is presumed from the previous conduct of the Bank of Montreal, in recognising his acceptances as binding upon it, and paying them, and this to the knowledge of the City Bank and La Banque Nationale, who both received the four cheques in question, and both gave value for them on the faith of similar acceptances having always been recognized and honored by the Bank of Montreal. The manager of a bank is entrusted with the funds of the bank, and is held out by the bank as its general agent; it would be productive of much injustice, if the bank could, after sanctioning a particular mode of doing business, suddenly question the propriety of it, and deny the power of its own officers in such management. In order to give weight to the objection taken to the authority of the manager to accept cheques, it is alleged that there was an officer in the Bank of Montreal specially appointed to accept cheques, known as the ledger-keeper. The reference to this officer is more plausible than real; it is necessary with every bank to be prepared when a cheque is drawn upon it, with the information whether the drawer has funds to his credit, hence the cheque is handed to the ledgerkeeper, who turns up to the account of the drawer and if there are funds he enters the cheque to his debit, and initials it, as an authority to the paying teller to honor it. This is not properly an acceptance of the cheque; the customer has nothing to do with the operation. The Bank imposes on one clerk, the ledger-keeper, the duty to ascertain and certify if it has funds of the drawer, and upon another, the paying teller, the duty of paying it. This is the mere internal economy of the bank. The question between the bank and the drawer of a cheque upon it, is, funds or no funds, without the operation of the ledger-keeper, influencing that question one way or the other. There is not a title of evidence that such

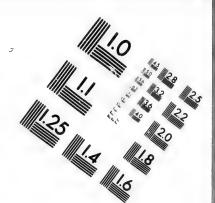
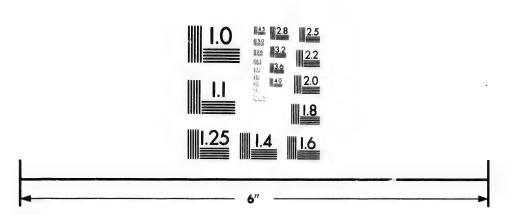


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clerks are checks on the manager, but the contrary appears. Vezina, the manager of La Banque Nationale, very properly and completely describes the effect of the initials of the manager upon a cheque to be an instruction to the ledgerkeeper to debit the drawer with the amount, and to the paying teller to pay it. The effect and intent of the manager, in putting his initials on a customer's cheque, is an instruction to the officers of the bank to give him a credit for the amount of it. This does seem to me to be an act of management, and to be incident to the office of manager. I now come to the most important head of defence, that by which it is pleaded that the plaintiff en garantie gave no value, or consideration, for these acceptances. This, if true in fact, is one of great weight, and would give support to the allegation of a combination to deceive and defraud the Bank of Montreal, which allegation must be proved as existing, not in intent only, but in fact; a mere consilium fraudis would not be enough, unless there were the eventus damni. Now, the evidence leaves no doubt of Ahern having given \$95,000 of the monies of the City Bank, for the cheques in question, and that Harris handed the drafts and cheques so given to Christian, who saw to the collecting, and did, in fact, collect the \$95,000 from the City Bank, and the Bank of Montreal have now in their coffers this money; that Harris obtained from Ahern the money of the City Bank for the Bank of Montreal, and paid it over is certain. It is equally true that his motive was to conceal the state of Sanderson's account. But, though such conduct is, doubtless, blameable, I have looked in vain for an actual fraud practised on the Bank of Montreal, in relation to these cheques. Sanderson's account was not, by these means, increased by a single dollar, it was overdrawn at the time, and the Bank of Montreal was informed of the fact, before the acceptance of these cheques, and, whatever the intention, nothing that was done did, in fact, deceive anybody, and the Bank of Montreal got full value for the promise of Harris to pay these cheques. The monies of the City Bank were given to the Bank of Montreal, for these acceptances, and for no other consideration. Did the question present itself under the aspect of which of two innocent persons should suffer loss by the act of Harris. I should think that the Bank of Montreal, as having put in the power of Harris to cause the loss, should bear it, but, under the circumstances of the present case, the question does not present itself in that form. The City Bank has paid \$95,000, for these cheques of the Bank of Montreal; and, if it were to be compelled to pay an other \$95,000 to the Banque Nationale, because of the refusal of the Bank of Montreal to honor

these acc Montrea tionale, the City would ap the debt to the de not, which of a third by those should r different acceptanc them to decide wl other; bu to get fun he hande proceeded Bank, wh tained by City Bank it, and are thinks itse it will be the case f authority similar act acts of asse evidence of circumstan moment, he the agency tances, oper cannot be a as to the re ployed on out money the fact, sei hands, and wards broug the bonds v opinion tha affirmance o that the assi and disavow adoptive aut

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these acceptances, it would lose this sum, but, if the Bank of Montreal be made to pay these cheques to La Banque Nationale, it loses nothing, because it had already received from the City Bank \$95,000, for these very acceptances; but it would apply the monies of the City Bank to the payment of the debt due by Sanderson to it, and thus benefit by \$95,000, to the detriment of the City Bank. So that the question is not, which of two innocent persons shall suffer from the act of a third. The question is one of banking, to be governed by those comprehensive principles of fair dealing which should regulate commercial matters. The case would be different if, after obtaining the City Bank funds for his acceptance of Sanderson's cheques, Harris had appropriated them to his own use, and the Court were called upon to decide whether the loss should fall on the one bank or the other; but such is not the case. Harris gave his acceptances to get funds for the Bank of Montreal, and, having got them. he handed them to Christian, the Inspector, who, forthwith, proceeded to collect and put the amount in the coffers of the Bank, where it has ever since remained. Thus, funds obtained by the Manager of the Bank of Montreal from the City Bank, for the Bank of Montreal, have been received by it, and are now retained by it, and yet, the Bank of Montreal thinks itself at liberty to call in question this act of Harris. It will be more satisfactory to state the law on this branch of the case from the books: Dunlop's Agency, p. 171 "As an authority may be presumed from previous employment in similar acts, so the same presumption arises from subsequent acts of assent or acquiescence; and a smaller matter will be evidence of such assent. And if, with a knowledge of all the circumstances, an employer adopts the acts of his agent for a moment, he is bound by them," Ditto p. 172 " An adoption of the agency in one part with a knowledge of the circumstances, operates as an adoption of the whole act: for an act cannot be affirmed as to so much as is beneficial, and rejected as to the remainder. Thus, an agent had been secretly employed on behalf of a bankrupt after his bankruptcy, to lay out money in India bonds. The assignees, upon discovering the fact, seized some of the bonds remaining in the agent's hands, and accepted them as part of the estate; and, afterwards brought an action against him for the money with which the bonds were purchased. The Court was very clearly of opinion that the acceptance of some of the bonds was an affirmance of the agent's act in laying out the money, and that the assignees could not avow one part of the transaction and disavow the other." Wilson and Poulter, 2 Str., 850. Such adoptive authority relates back to the time of the original TOME XXIII.

transaction, and is deemed in law the same, to all purposes, as if it had been given before. Lawrence & Taylor, 5th Hill 107, 113. If I make a contract in the name of a person who has not given me any authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it. But, if, with full knowledge of what I have done, he ratify the act, he will be considered to have contracted originally by my agency, for the certification is equivalent to an original authority according to the maxim that omnis ratihabitio mandato aequi paratur. See Liv. Pri. and Ag., p. 44 and seq. The acts of the principal are to be construed liberally in favor of an adoption of the acts of an agent, p. 394. It is evident that there can be no stronger ratification of the act of an agent than the principal's availing himself of such act, although unauthorized; and that, in like manner, a person availing by himself of the act of one whom he had not originally appointed his agent must be deemed retrospectively to have created the agency from which he derives profit. In either case, the presumed ratification subjects the principal to the same liabilities to third persons, or to the agent, as if the latter had, in the one case, acted within the scope of his power, or, in the other, had been duly constituted agent. That an act cannot be adopted in part and rejected in part, is a general rule applicable to other cases besides this of principal and agent. Capel and Thornton, 3 Car. & Payne, p. 352. The same principles are to be found in our own law. If applied to the present case, the manager of the bank would be considered an institor, and would bind his principal by his proper act of administration and how could that fail to be considered a proper act, which, as in the present case, is proved to be usual and customary with all banks; there is a delegation of power, by presumption of law, which applies to one at the head of a mercantile establishment, such as the manager of a bank, and the maxim of law then applies qui facit per alium facit per se. (1 Bell's Commentaries, page 170.) Applying these principles of law to this case, Harris, the manager of the Bank of Montreal, with what motives it is unnecessary to repeat, obtains from the City Bank \$95,000, in return for his acceptance of Sanderson's cheques, for a similar amount, and gives this sum to the Bank of Montreal. Is this or not a ratification of the transaction of Harris? Or can the Bank of Montreal be admitted to affirm so much of the transaction as is beneficial, and to retain the monies of the City Bank, and to reject that part of the transaction which consists in the promise to pay these cheques? Can the Bank of Montreal be permitted to repudiate the promise to pay these cheques, and yet retain the consideration given for it? I apprehend not.

There Harris cannot of Har upon a there e of givi on acce thus pe that thi act of n accept t derson h Bank of time, and appear in That the books, es which is overdraft 4th. That in the or and La I frequently ed and pai real, cause the cheque Bank of M tances; 5tl Harris to a nized, gave accepted ch real adopte question, by given for su the authorit relates back cheques in intents and had been giv cannot hesit render, and i the declaration as the depos value of them has refused t clusion that t ot to if. he зy, ıcni of an hat entugh by intated , the ame atter r, or, 1 act neral and same o the \mathbf{dered} act of red u to be on of t the r of a liumlying ger of ry to or his t, and ratink of on as , and n the eal be s, and

not.

There has been by the Bank of Montreal a ratification of Harris' transaction, so unequivocal and substantial, that I cannot arrive at another conclusion than that the acceptance of Harris is the acceptance of the Bank of Montreal, and, upon a review of the whole case, I am opinion: 1st. That there exists usage or custom, in the Banks of this Province, of giving credit to their customers, by means of the initials on accepted cheques of the manager, and in his discretion, thus permitting the customer to overdraw his account, and that this power is incident to the office of manager, and is an act of management; 2nd. That the authority of Harris to accept the cheques in question is to be presumed from San derson having been permitted to overdraw his account at the Bank of Montreal, by this means, for so long a period of time, and for such very large sums, all of which overdrafts appear in Sanderson's account kept in the Bank books; 3rd. That these overdrafts of Sanderson, appearing in the bank books, established that the Bank of Montreal did know, or, which is the same thing, is presumed to have known of such overdrafts, and to have assented and acquiesced in the same; 4th. That the fact of accepted cheques of Sanderson, passing in the ordinary course of business, through the City Bank, and La Banque Nationale, for so long a period of time, so frequently and for such large sums, all of which were honored and paid to the Banque Nationale, by the Bank of Montreal, caused an authority to be presumed in Harris to accept the cheques in question, from the previous conduct of the Bank of Montreal in recognizing and paying Harris's acceptances; 5th. That Ahern, on the faith of the authority of Harris to accept Sanderson's cheques, having been so recognized, gave the funds of the City Bank to Harris, for the accepted cheques in question; 6th. That the Bank of Montreal adopted the act of Harris's acceptance of the cheques in question, by receiving from him the funds of the City Bank, given for such acceptance, and are stopped from questioning the authority of Harris; 7th. That such adoptive authority relates back to the time of the acceptance by Harris of the cheques in question, and is deemed, in law, the same, to all intents and purposes, as if the authority to accept the same had been given before their acceptance. With these views, I cannot hesitate about the judgment which it is my duty to render, and it is in exact accordance with the conclusions of the declaration. The City Bank is sued upon these cheques, as the depositor of them, and as having received the full value of them. It is so sued, because the Bank of Montreal has refused to pay these cheques. If I am right in the conclusion that the Bank of Montreal has ratified and adopted

the acceptance of their manager, it must indemnify the City Bank from any condemnation which may pass against it upon these cheques. The following is the conclusion of the formal judgment: "The Court doth adjudge and condemn " defendants en garantie, jointly and severally, to intervene " in the suit so brought by La Banque Nationale, against plaintiffs en garantie, and now pending in this Court, as garants simples of the plaintiff en garantie, and cause the said suit of La Banque Nationale to be di-missed, with-"drawn, or discontinued, so far as respect- the claim and "demand of La Banque Nationale, for the said sums of " money in the said cheques, respectively specified, amount-"ing together to the sum of ninety-five thousand dollars; " and, in default thereof, defendants en garantie are hereby "adjudged and condemned, jointly and severally, to gun-" rantee, indemnify and save harmless plaintiffs en garantie " of and from every sentence, decree or judgment which may " be made and rendered against plaintiffs en garantie, in " favor of La Banque Nationale, as well as for principal and "interest, as costs of suit which plaintiffs en garantie may " be condemned to pay to the Banque Nationale for the cause "aforesaid; the whole with costs. And the Court doth " reserve to itself the right of rendering such other and "further judgment in the present cause as the justice of the "case and the law and practice of this court warrant and "admit of." This judgment was unanimously affirmed by the Court of Review.

TASCHEREAU, J.: Il s'agit d'une demande en garantie, portée par la Banque de la Cité, contre la Banque de Montréal, sous les circonstances suivantes: La Banque Nationale, à Québec, et la Banque de la Cité (de Montréal) étaient en compte courant, au moyen de dépôts que cette d'rnière faisait dans la Banque Nationale, pour racheter ses billets qui se trouvaient journellement dans le cours du commerce à Québec, en la possession de la Banque Nationale. Cette entente entre les deux banques durait depuis plusieurs années, lorsque, vers le 15 septembre 1869, parmi les argents ou valeurs déposées, comme d'ordinaire, par la Banque de la Cité, dans la Banque Nationale, se trouvent quatre chèques tirés par le défendeur Sanderson, pour un montant total de \$95,000. Ces quatre chèques, ostensiblement, étaient acceptés par la Banque de Montréal, à Québec, et furent, sans aucun soupçon apparent, mis au crédit de la Banque de la Cité, qui en retira de suite le montant, par des chèques tirés par McGie, agent de cette banque. Sur présentation de ces quatre chèques à la Banque de Montréal, sur laquelle ils étaient tirés, et dont ils portent l'acceptation, cette dernière en refusa

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le paiement d'une manière péremptoire. Sur ce refus, la Banque Nationale fit demande à la Banque de la Cité d'un remboursement immédiat du montant représenté par ces quatre chèques; la demande, sans être absolument accueillie ou refusée de prime abord, fut suivie d'une lettre de McGie, agent de la Banque de la Cité, reconnaissant la responsabilité de sa banque envers la Banque Nationale, pour ces quatre chèques, mais cette reconnaissance ne fut suivie d'aucun paiement, ni règlement final, mais, au contraire, après correspondance et entrevue entre les principaux officiers de l'une et de l'autre banque, la Banque de la Cité refusa de rembourser les \$95,000. A la suite de ce refus, la Banque Nationale institua son action contre la Banque de la Cité pour \$106,000, comprena t les \$95,000 représentés par ces quatre chèques de Défenses furent produites par cette dernière, à l'encontre de l'action de la Banque Nationale, et, pendant l'instance, la Banque de la Cité, présente demanderesse, institua, contre la Banque de Montréal, l'action en garantie dont il s'agit actuellement, par laquelle elle réclame un droit de garantie, de la part de la Banque de Montréal, et de la part de Sanderson, pour ces \$95,000, contre tout jugement qui pourrait être prononcé contre elle en faveur de la Banque Nationale. La Cour Supérieure, à Québec, a donné gain de cause à la Banque de la Cité, déclarant que la Banque de Montréal et Sanderson doivent la garantir, à toutes fins que de droit, des conséquences de l'action de la Banque Nationale, et de tout jugement qui pourrait être prononcé contre elle, à l'instance de cette dernière, relativement aux quatre chèques en question; c'est ce jugement qui nous est actuellement soumis en Révision. La Banque de Montréal, et Sanderson, ont produit un long plaidoyer à cette action, lequel peut se réduire à ce qui suit, savoir, que Sanderson était un homme n'ayant aucun fonds dans la Banque de Montréal, et ne possédant aucun crédit dans le monde commercial, que son compte dans la Banque de Montréal avait été soutiré, et que les quatre chèques dont il s'agit avaient été acceptés par Harris, administrateur général de la Banque de Montréal, sans autorité quelconque, en dehors des devoirs de sa charge, hors de l'enceinte de la bâtisse de la Banque, que nulle valeur ou considération n'avait été reçue par la Banque de Montréal, pour ces quatre chèques; que Harris, comme simple gérant, n'avait pas le droit de certifier ou accepter des chèques, et que ce droit, ou ce pouvoir, résidait exclusivement chez un autre officier, le teneur du grand livre de compte, (Ledger Book-keeper); enfin plaidant fraude et concurrence entre Harris, Sanderson et la Banque de la Cité, dans le but de porter prejudice à la Banque de Montréal. Pour réussir, dans sa demande en garantie, il suffisait à la Banque de la Cité de prouver les faits suivants: 1° Qu'elle avait reçu ces quatre chèques dûment acceptés par la Banque de Montréal, qu'elle les avait déposés dans la Banque Nationale, et que, sur refus de la Banque de Montréal, de les lui payer, la Banque Nationale avait institué, contre elle, la Banque de la Cité, une action en répétition du montant de ces chèques; 2º De repousser toute preuve qui serait faite d'aucune participation de sa part dans la fraude que la Banque de Montréal, par sa plaidoirie, reproche à ses officiers, Harris et Sanderson. Une longue enquête s'ensuivit, et, dans mon opinion, il en résulte clairement que la Banque de la Cité a prouvé tous les faits ci-dessus, et, notamment, que, d'après l'usage universellement reconnu, et suivi par nos banques, dans la Province de Québec, un chèque tiré sur une banque, accepté, soit par un officier subalterne à ce préposé, ou par le gérant administrateur de la banque, est considéré comme valable et liant cette banque, d'une manière irrévocable. Il est aussi prouvé que l'habitude de tirer au-delà de son dépôt est admise par les banques, sous certaines circonstances. Ces permis discrétionnaires semblent avoir été exercés par tous les gérants de banque, et même par Christian, qui est celui qui était descendu expressément de Montréal, pour régler la difficulté en question. Dans le cas présent, les livres de la Banque de Montréal démontrent, jusqu'à l'évidence, que Sanderson, dont cette institution répudie le caractère et la solvabilité, avait soutiré, plus de cent fois, son compte, et ce fait n'a pu échapper, non seulement à un ceil aussi perspicace et pénétrant que celui qui dirige depuis longtemps, avec tant de succès, les affaires de la banque de Montréal, mais à tout le bureau de direction de cette institution. Le fait me paraît clairement prouvé que Sanderson, en habile financier, était l'organe de la banque de Montréal, au jeu de la bourse, sur l'or ou fonds quelconque. Et c'est ce même homme que la banque de Montréal répudie aujourd'hui, comme s'étant prêté à une fraude manifeste, de concert avec le gérant Harris. S'il v a eu fraude, elle date de loin, et elle avait pris racine depuis longtemps dans les livres de la banque de Montréal. C'est en vain que l'on cherche à se demander comment la banque de Montréal peut prétendre répudier cette acceptation des quatre chèques de Sanderson, avec quelque chance de succès, ou même avec quelque apparence de plausibilité. Si elle pouvait y réussir, que deviendrait la sûreté du commerce de banques? Personne n'oserait accepter un chèque accepté, pas même un billet de banque, sous le prétexte que celui qui avait accepté ce chèque, ou signé le billet, n'y était pas autorisé, quoique depuis des années, au vu et su de la

banqu semble maniè duquel au pub Les au fondées Montré spéciale Je ne Cet off jour en commen la veille Mais sûr acceptat toujours ses supéi tout indi banque, que l'on Je ne j rationnel ouverts d direction, Harris, a ses chèqu faire sup imprudent direction réponse ca de Montré valeur pou coffres au Nationale, point de de a reçu val accommode sur elle auest la cons et les porte les victimes réal dans H car elle se répétition o crédit qu'ell de toutes les re

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banque, il eût déjà répété l'acte plus de cent fois. En semblable matière, l'autorité se présume, s'infère d'une manière conclusive, par le fait que le principal, au vu et su duquel l'acte a eu lieu, ne l'a pas répudié, et a permis au public de croire à l'existence de l'autorité du subalterne. Les autorités légales, dans ce sens, sont abondantes, et sont fondées sur le simple bon sens, et l'équité. Mais la banque de Montréal prétend qu'il y avait, dans son bureau, un officier spécialement chargé de la besogne d'accepter les chèques Je ne sais pas quelle différence ce fait puisse produire: Cet officier n'est pas en permanence, il peut être changé de jour en jour, et, de fait, ce changement s'opère souvent! comment le public peut-il le distinguer, et savoir si celui qui, la veille, avait ce pouvoir, le possède encore le lendemain? Mais sûrement, il ne peut y avoir de meilleure et de plus sûre acceptation que celle du gérant administrateur, homme toujours jouissant d'une haute capacité, et de la confiance de ses supérieurs, et supposé connaître la valeur du crédit de tout individu qui se présente et veut devenir débiteur de la banque, et c'est à cet homme supérieur, au chef directeur, que l'on ose nier le pouvoir qui se donne à un subalterne. Je ne puis m'expliquer cette différence d'une manière rationnelle. Mais, encore une fois, les livres de la banque, ouverts depuis, je dirai des années à l'inspection de toute la direction, constatent que Sanderson, avec l'approbation de Harris, a tiré au-delà de son crédit, et que la banque a honoré ses chèques plus de cent fois; et, dans le cas présent, on veut faire supporter à un étranger les conséquences des actes imprudents, je ne dirai pas de Harris seul, mais de toute la direction de la banque de Montréal. L'enquête contient une réponse catégorique à cette partie du plaidoyer de la banque de Montréal, par laquelle elle allègue qu'elle n'a reçu aucune valeur pour ces \$95,000, qui, en réalité, sont passés dans ses coffres au moyen de divers chèques tirés sur la banque Nationale, par la banque de la Cité. Ainsi, sur ce fait, point de doute qu'originairement elle (la banque de Montréal), a reçu valeur pour les \$95,000, mais elle a, plus tard, voulu accommoder son courtier confidentiel, et lui permettre de tirer sur elle au-delà de ses fonds et avoir ces \$95,000. Quelle en est la conséquence, et à qui la faute est-elle imputable, et les porteurs de bonne foi de ces chèques pouvaient-ils être les victimes de cet excès de confiance de la banque de Montréal dans Harris et Sanderson? Non, sans doute, disons-nous, car elle se doit imputer la faute d'avoir encouragé la répétition d'un crédit quasi illimité donné à Sanderson, crédit qu'elle a sanctionné près de cent fois, en connaissance de toutes les circonstances. Et d'ailleurs, si cet acte de Harris

et de Sanderson était si imputable, pourquoi la banque de Montréal n'a-t-elle pas essayé de se justifier par une accu-sation formelle? Elle n'en a rien fait, Sanderson est à Québec comme de coutume, Harris a pu s'éloigner, mais son lieu de résidence est bien connu, et, cependant, pour cette prétendue grande fraude que la banque de Montréal leur reproche, ils ne sont pas recherchés ni inquiétés par cette dernière. Ce n'est peut-être pas une admission d'innocence chez ces deux individus, mais une présomption assez forte que l'acte qu'on veut bien reprocher aujourd'hui n'est que la centième répétition de ce qui s'est passé, et qu'il serait impossible de convaincre au criminel des hommes auxquels on n'a pas seulement reproché de semblables faits, mais auxquels on avait peut-être donné carte blanche pour le jeu de bourse. En révision, la banque de Montréal a produit un factum exposant grand nombre de motifs pour lesquels le jugement dont elle se plaint, devait être renversé. Ayant, dans nos remarques précédentes, fait allusion à toutes ces objections qui se réduisent en leur plus simple expression à nier les pouvoirs de Harris d'accepter les chèques de Sanderson, et à reprocher fraude, je me bornerai actuellement à discuter deux de ces motifs, savoir: le 1er et le 2nd auquel je n'ai encore fait aucune allusion. Le premier motif est que cette cause n'aurait pas dû être entendue au mérite, ni jugée. si ce n'est qu'après la décision de l'action principale, savoir celle de la banque Nationale contre la banque de la Cité. Je crois que ce motif n'a aucun fondement, et est contraire aux principes qui régissent la procédure à suivre sur une action en garantie. En effet, quoiqu'il serait désirable que les deux actions procédassent, pari passu, cependant le défendeur en garantie ne peut forcer ses adversaires à procéder ainsi, à moins qu'il n'intervienne dans la cause, et ne plaide à l'action du demandeur principal, et reconnaisse son obligation comme garant. Dans ce cas seul, il devient jusqu'à un certain point Dominus litis, et exerce un certain contrôle sur la procédure. Mais s'il nie le droit d'action en garantie, il s'enlève, par là, une issue principale qu'il est loisible au demandeur en garantie de faire avant celle de la demande principale en prouvant qu'il est garant, en supposant et prouvant la vérité des allégations principales de la demande en chef. et en priant conditionnellement à ce qu'il soit condamné à l'indemniser de toute condamnation éventuelle sur la demande principale. Pigeau dont l'opinion a fait loi au Chatelet, comme elle nous a toujours guidé ici, s'exprime dans ce sens, à la page 181 du 1er vol. de la procédure civile, "si l'appelé "en garantie se reconnaît garant, ou que, l'ayant denié, "il y ait jugement qui l'ait declaré tel, contre lequel il ne

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" puisse ou ne semble pas pouvoir, il doit prendre le fait et " cause pour la garantie." Ces lignes si clairement exprimées ne laissent aucun doute que la demande en garantie formelle, comme la simple, pouvait être jugée séparément, et avant la demande principale, puisque Pigeau suppose le cas où le garant est condamné, et doit, en raison de cette condamnation, prendre le fait et cause, ou intervenir. Serpillon, page 93 de son commentaire de l'ordonnance de 1667, dit: "La demande principale et celle en garantie sont souvent si peu dépen-"dantes l'une de l'autre, qu'elles peuvent être jugées séparé-" ment, quand elles ne se trouvent pas en état dans le même "temps pour être jugées conjointement par un même juge-" ment, ce qui oblige de juger presque toujours la demande " principale séparément." Le 2e motif d'objection des défendeurs en garantie est que les demandeurs en garantie n'ont pas répondu aux questions sur faits et articles qui leur ont été soumises par la banque de Montréal, ou plutôt qu'il n'apparaît pas que M. Ross, leur procureur ad litem, nit été autorisé à répondre en leur nom. Cet objection fut renvoyée par la Cour Supérieure en première instance, et je crois avec raison. Le dossier établit une procuration certifiée par le président et le caissier, attestée par un notaire public, autorisant M. Ross à reproduire devant la Cour, la série des réponses de la banque de la Cité aux interrogatoires signifiés aux demandeurs en garantie, et contient les réponses à y être faites; cette procuration, cette résolution et ces réponses sont produites au dossier et ne sont pas répudiés par les demandeurs, les défendeurs seuls disent, ce ne sont pas vos réponses, et les demandeurs toujours censés présents en Cour et surveillant les actes de leur procureur, disent, ce sont nos réponses données en vertu d'une résolution certifiée par notre président, en la présence d'un notaire public. Le tout est en forme authentique, et le soul moyen d'attaquer ces réponses, et, par contre coup, les données y annexées, serait l'inscription de faux. Je crois donc, qu'il n'y a pas eu erreur dans le jugement qui nous est soumis en Révision, et qu'il doit être confirmé in toto, avec dépens sur la présente Révision.

DUNKIN, J.: The grounds of revision submitted by the Bank of Montreal are detailed in a variety of forms, as thirty-four in number; but may all be fairly reduced to, and treated under one or other of, five heads of objection; one of which was expressly abandoned by counsel at the hearing, and two more of which were not strongly insisted on. The two others were urged with the utmost energy and earnestness. The first of these relates to a technical objection taken to the answers on faits et articles of the City Bank, and calls for no remark. A second rests on the proposition that the judgment is prema-

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ture, because rendered before that on the merits of the main action. As to this, it is enough to say, that whatever may be the inconvenience of dealing with the two actions separately, it is here unavoidable. One is taken to a jury; the other They cannot be kept together for proof or hearing: and, therefore, cannot be adjudged together. And it would be as reasonable to say that the main action must be held back till the action en garantie shall have been decided, as to say that the latter must be held back for the for-The plaintiff in each has the right to push it on, irrespectively of the progress of the other. Indeed, if a plaintiff en garantie, demanding that his defendant be condemned to intervene, and help him in a suit. cannot get a judgment on that demand till after such suit is ended, his demand is pro tunto rejected beforehand, is for all practical purposes treated as though not made at all. A third objection runs to the effect, that the main action, according to the evidence here adduced, ought to be dismissed as to the City Bank, and that, therefore, the action en garantie ought to be dismissed, as against the Bank of Montreal. But the merits of the main action are not here in issue, and cannot be dealt with. plaintiff therein is not here present. The pleadings therein are here unknown; and the evidence too. Even the Court as here personally constituted, and the Court as constituted to deal with it, are not the same. The question here is, whether or not the defendant here ought therein to help and save harmless the party defendant there. If the defendant there is in no serious danger, the better for the party defendant But not necessarily to the extent of entitling him to a judgment that shall clear him of obligation altogether. Whether his obligation is light or grave, is not in question; but simply whether it subsists at all. And this is a question purely between the parties to this action, irrespectively altogether of the relations between the parties to the main action. The two ramaining objections may be thus stated:—1. That, under the issues substantially raised by the special plea of the Bank of Montreal, these cheques are not shown to have been validly accepted by the Bank of Montreal. 2. That, under the issue substantially raised by the défense en fait of the Bank of Montreal, they are not shown to have passed to the City Bank and Banque Nationale, so as to entitle the former to implead the Bank of Montreal, in manner as by their declaration en garantie they here assume to do. The questions involved in these two propositions remain, therefore, to be considered; simply, however, in reference to this suit, that is to say, as between the two parties here litigant, under the issues here raised, and in view of the evidence thereto

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relevant and here of record. Limitations of view, which, obvious as they are, yet, go to set aside, in great part or wholly, no small portion, of the vast mass of conflicting evidence and argument, with which the case, (from the interests and feelings involved in it) has unfortunately come to be overlaid. Sanderson had long been a heavy customer of the Quebec Branch of the Bank of Montreal, and had acquired a fatal ascendency over Harris, the unfortunate manager of that branch. Involve in speculations, he found need to overdraw his account; and Harris, weakly and wrongly, allowed him to do so, and more weakly and wrongly combined with him to hide the fact from the head office. Unhappily, this was but too easy. As a necessary internal arrangement of any bank doing a considerable business, cheques are required, before being presented to the teller for payment, to be taken to another officer, having charge of the Individual Ledger, and whose duty it is to see whether the drawer has funds, and, if he has (but not otherwise), then to initial, or otherwise mark the cheque, so as to instruct the teller that he is to pay it. And as an unavoidable result, such cheques, instead of being always at once presented for payment, are often taken away and pass into other hands before payment, the initials or other known mark giving assurance that it will be paid. In fact, such initialed cheques have long come to be generally recognized as cheques accepted by the Bank. Upon this usage, it is contended that there has grown up another, of a more exceptional character. Circumstances may exist to warrant an overdraft, even in the interest of the bank; and, in such case, of course, the subordinate officers of the bank may and should be instructed by their chief accordingly. The cheque, with his initials, may then pass into third hands before reaching them. And the question so arises, whether his initials, so written as an order to them, and suffered to reach and influence others, are or are not just as much an acceptance of the cheque by the Bank as theirs could be. Instance of such rightful initialing by a manager is even furnished by the evidence in this case. Sanderson, in the days of Harris's predecessor, had been more or less employed as a broker to buy exchange for the Bank. The sellers of course would not part with their exchange on his mere personal credit. And so, if his account stood low, the manager (informed of the circumstance) would initial his cheque by way of authority to the Ledger-keeper to make the necessary entry and add his own initials, as for the teller's guidance. Whether any such cheques, in those days, ever went into third hands before reaching the Ledger-keeper does not appear; but it is natural to suppose they may. Sanderson's employment as a broker

for bank transactions went on, under Harris, as under his predecessor, and the way was thus smoothed most dangerously for the gradual establishment of a system of overdrafts, set right and recurring from time to time in his behalf. This state of things, as regarded Sanderson's account, had lasted so long as to have become inveterate, and the default had assumed alarming proportions; when the Head Office, hearing something of it, sent Christian, their Inspector (and who had not inspected the Quebec Branch for some eighteen months previous) to enquire into the matter. His arrival, on the afternoon of the 14th of September, (these disputed acceptances purporting to be of the 13th and 14th) brought things to a crisis, and has resulted in this litigation. Meantime, the City Bank, without maintaining a Branch at Quebec, had long employed McGie as their agent there, to promote circulation of their notes; and had so accredited him in that capacity to the Banque Nationale, as to have induced that institution to become their main ally, and (in fact) banking house, in respect to their operations at Quebec, which took a wide range and involved large amounts. McGie (being also agent for some other parties, though on a very much smaller scale) signed his name for all business purposes as "D. McGie, Agent," and, in that name, kept a deposit account with the Banque Nationa'e, which account thus involved all the direct Quebec banking transactions of the City Bank, and, at times and to a less extent, some others besides. And he had unfortunately fallen into the habit of leaving the conduct of his whole business as City Bank agent, and otherwise, to Ahern, his clerk, whose doings he seems not to have controlled or watched in the least; and who filled in and disposed of his cheques (signed wholesale, in blank) absolutely at pleasure. Between Sanderson, thus in undue relation with Harris, who was less watched than he might have been by the Bank of Montreal, his principal, and Ahern thus unduly trusted by McGie, who again was unwatched by the City Bank, his principal, there had long subsisted an undue alliance; the two contriving to set Sanderson's account right periodically, so as (with Harris's help) to deceive the Head office of the Bank of Montreal, by means of exchanges of Sanderson's cheques, accepted by Harris, for his Bank, but without entry thereof made to the debit of Sanderson's account, against cheques of McGie surreptitiously filled in by Ahern, or other City Bank funds, or securities unduly at his (Ahern's) commind. These latter being deposited to the credit of Sanderson's account some little time before the former found their way to it, through the Banque Nationale, the reports made in the interval saved appearances, and gave the confederates

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the time by which they doubtless long hoped that they would eventually bring things round into a safe position for them all. This Sanderson-Ahern alliance was of course well known to Harris, in so far, at least, as regarded its bearing on Sanderson's account. By McGie, it seems to have been unsuspected. And it is hardly necessary to say that the evidence shows that the Bank of Montreal had no suspicion of anything wrong, until just as they sent Christian down, and that the City Bank had none until after Christian's mission had done its work. Arriving late in the day, unexpected, and, at once, glancing at Sanderson's account, in the Individual Ledger, Christian saw that it stood there apparently overdrawn to an amount of \$33,365.05; but, as he says, from the fact that the transactions of the day might not all have found their way into it, he was not altogether certain as to the real state of the account. Presumably, his glance must have led him to infer much more as to past transactions. But he said nothing, and postponed examination to the next day. After bank hours, between four and six, at Sanderson's office, Sanderson (with a clerk of his, named Robertson,) and Ahern and Harris met; and, there, in the vain hope of getting Sanderson's account into such a state as might deceive Christian, the fourth Sanderson cheque for \$43,000 was drawn and initialed, the usual figures "526" indicative of Sanderson's folio in the ledger, being omitted in the hurry; and Ahern furnished City Bank effects (two cheques and a draft) for that total amount, which Harris took. Whether or not the other three cheques here in question (or some of them) were drawn or initialed at the same time and place, may admit of a shade of doubt, as the witnesses are not all of them clear in their recollections. Presumably, however, they had been drawn and initialed previously; that of the 13th during that day, and the two of the 14th, early in that day. And, presumably, they were initialed at the office of the Bank of Montreal and in bank hours. What is certain is that (whenever and wherever initialed) Harris received for each, then and there, the like amount of cash-security furnished by Ahern. For the \$95,000 of initialed cheques he took, at the time or times when he initialed them, the full \$95,000 of such funds. His initialing was meant and understood to be a bank acceptance, in consideration of the funds; and the funds would not otherwise have been given. Looking next morning at Sanderson's account, in the individual ledger. Christian found it altered in Harris' handwriting, by a credit of this \$43,000 consisting of the funds thus obtained for such last acceptance, from Ahern. and by certain other entries and some erasures; ar? he immediately suspended Harris, and took charge of the Branch

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himself, though, without at once announcing the fact to the public. Next day, Harris, with Ahern's aid, absconded. And, soon after, Ahern absconded also. During the same day, the 15th, Ahern effected with Christian (who was then ignorant of the antecedent circumstances of the affair) an exchange of the three securities, making up the \$43,000, for another of a different form. And it is distinctly in evidence that the whole \$43,000 was paid to the Bank of Montreal; \$24,500, directly by the City Bank, \$18,500, by the Banque Nationale, as on City Bank account. The \$52,000 of other securities taken by Harris for the three other acceptances, seem also to have been carried in the individual ledger to Sanderson's credit, and to have been realised at the cost (direct or presumably eventual) of the City Bank. But, even if there be doubt as to this, it is at least certain that Harris handed them to Christian for the Bank of Montreal, and that the Bank of Montreal have taken them, and ever since dealt with them as their own. The four acceptances were, of course, none of them debited to Sanderson, in the individual ledger, as they should have been. Under these circumstances, the Bank of Montreal contend that the act of their manager, Harris, in assuming thus to accept these cheques, was so manifestly in excess of his powers and fraudulent, that they are entitled to repudiate it. That it was irregular in the highest degree, and even fraudulent, is certain. Whether or not it was so in excess of Harris' powers as to import (prima facie, that is to say, independently of the point of their having or not having ratified it) their right to invoke its nullity, as against a holder in good faith, and, according to the evidence, the two Banks themselves are here, the one in just as good faith as the other, in respect of these transactions, is a question that may be open to more argument. Pleading, evidence, argument and authority are all brought into abundant requisition, in reference to it, by both parties. But it is not the question that really here presents itself, and upon which this part of the case must turn. Utterly wrong as Harris' act was, it was not the unilateral contract of allowance of an overdraft, in violation of bank rule, and to the obvious direct prejudice of the bank. The overdraft existed; was a fixed fact; was made neither worse nor better. Each of these acceptances formed part of a bilateral contract, under which he got for his Bank funds supposed good (and which seem here to have so proved), in full equivalent for the new draft allowed. Keeping these funds as theirs under such contract, the Bank accept each such contract, burthens and advantages together; have made his whole act theirs; cannot escape from that part only of it which they do not like, as not theirs. As this case stands, therefore, between the City

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Bank and Bank of Montreal, I have no choice but to hold these four acceptances as valid. Are they then shewn to have so passed to the City Bank and Banque Nationale, as to warrant the former in suing on them in manner and form as they here do? The declaration en garantie says Sanderson delivered them to the City Bank, for value, and the City Bank delivered them to the Banque Nationale, who now hold them. The fact, as the Bank of Montreal contend, is, that Sanderson delivered them to Ahern, who, without McGie's personal knowledge though in McGie's name, delivered them to the Banque Nationale, to the credit of McGie's account there kept, the whole without any direct participation or knowledge of the City Bank as to the transaction. It must be borne in mind, however, that the Bank of Montreal meet the above averment of the declaration only by a general issue; and that, by their special pleading, so far from distinguishing between the City Bank and McGie and Ahern, as acting separately in these tran actions, they make out both McGie and Ahern to be servants and agents of the City Bank, and their acts (to the extent even of complicity in fraudulent intent) the acts of the City Bank. So pleading, can they be suffered now to advance precisely the opposite pretension, unwarranted as it is by any other pleading on their part? But, aside from this, taking the facts as thus stated to be provable and proved under the issue as they stand, the very technical conclusion sought to be drawn does not follow. McGie alone was the agent of the City Bank; that is to say, he had no right to delegate any function of his, as such agent, to Ahern, could not and did not by any act of his make Ahern their agent. But he could and did, by his blind confidence in giving Ahern full mastery of his signed blank cheques and of his business otherwise, make Ahern his own agent, and with the largest powers. Ahern's acts unless as to personal imputation of whatever may have been Ahern's own fraud of purpose were his: at all events were his, save in so far as he may availably and expressly disclaim them and get rid of them. The City Bank cannot be forced to recognize them as acts of their agent; but of course can do so if they please. In this case they have done so as they have the right; and the Bank of Montreal is here in no position entitling them to object. Whether McGie's quality as agent of the City Bank (or even Ahern's for that matter) as to any particular step in these transactions results in point of logic from their previously intended authorization, or from their after adoption of what he has done, is here immaterial. They have here called what has been done in the matter of the taking of these acceptances from Sanderson, and the delivery of them to the Banque Nationale, their act; and this. under circumstances which, according to the pleadings and proof here in question, warranted their so doing. I am satisfiel, accordingly, that the judgment under review is right, and ought to be confirmed. Judgment of S. C. confirmed. (17 J., p. 197; 3 R. L., p. 28; 1 R. C., p. 237)

Ross & Stuart, for plaintiff en gar.

OKILL STUART, Q. C., Counsel.

HOLT, IRVINE & PEMBERTON, for defendant en gar.

EXCEPTION DILATOIRE.-DEPENS.

Court de Circuit, Montréal, 12 mai 1873.

Coram BEAUDRY, J.

CALVIN et al. vs BERTRAND.

Jugé:-1º Qu'un demandeur, non résidant en la province de Québec, est tenu de fournir au défendeur, poursuivi en cette province, caution pour sûreté des frais pouvant lui résulter de telle poursuite.

2° Qu'il est également tenu de produire au dossier la procuration requise par l'art. 120, s. 7, du C. P. C.
3° Que faute par lui de ce faire, il est loisible au défendeur de demander, au moyen d'une exception dilatoire, que tous procédés sur l'instance soient suspendus, jusqu'à ce que telles caution et procuration aient été fournies au désir de la loi; et le demandeur devra payer les frais de l'exception dilatoire. (1)

Les demandeurs résident en la province d'Ontario. Le défendeur produit une exception dilatoire, par laquelle il demande la suspension des procédés, jusqu'à ce que les demandeurs lui aient fourni caution pour ses frais, ainsi que la procuration à laquelle il a droit en pareil cas. Aussitôt après la production de l'exception, les demandeurs s'empressent de fournir le cautionnement et la procuration demandés, mais refusent de payer les frais de l'exception : de là la présente contestation. La réponse des demandeurs à cette exception est qu'elle est mal fondée en loi, pour les raisons suivantes:

"Parce que le défendeur ne pouvait, par telle exception, demander, ainsi qu'il l'a fait, la suspension des procédés; parce que le seul procéde au moyen duquel il pouvait obtenir ce qu'il demande par l'exception, était une motion pour cautionnement de dépens, et non pas l'exception dilatoire."

PER CURIAM: Les demandeurs se sont soumis aux exigences de l'exception dilatoire; ils ont fourni la procuration et le

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⁽¹⁾ Un jugement en ce sens a été rendu dans la cause de Baltzar & al. 1% Grewing & al., rapportée au 13 J., p. 297; 19 R. J. R. Q. 407, et 535. (Torrance, J.)

cautionnement requis par cette exception; leur contestation me paraît mal fondée. Pour ce qui est du procédé employé par le défendeur, il est parfaitement régulier et le seul dont le Code de Procédure fasse mention. La cour ne prétend pas que la voie de la motion soit interdite, mais l'exception dilatoire est certainement permise en pareil cas, et celle du défendeur étant bien fondée est maintenue, avec dépens. (17 J., p. 226)

LORANGER & LORANGER, pour les demandeurs. D'AMOUR & BERTRAND, pour le défendeur.

DEFENSE EN DROIT.

COUR SUPÉRIEURE, Montréal, 31 mars 1873.

Coram MACKAY, J.

Roy et al. vs Gauthier.

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Jugé:—1° Qu'une défense au fond en droit sera rejetée, mais sans frais, s'il appert que du consentement des parties, elle n'a pas été plaidée en temps utile, ayant au contraire été réservée pour être plaidée lors de l'audition au mérite.

2º Que dans l'espèce, les parties devaient préalablement à l'audition finale au mérite inscrire et plaider la dite défense en droit, et n'avaient pas le droit de la réserver pour qu'il n'en fût disposé que lors de l'argument final au mérite.

Le défendeur avait produit, avec ses plaidoyers au mérite, une défense au fond en droit, à l'encontre de l'action des demandeurs, laquelle fut réservée par les parties, pour n'être plaidée que lors de l'audition finale au mérite. Lors de cette audition, l'hon. juge siégeant fit remarquer que la coutume de réserver ainsi les défenses en droit, lui paraissait irrégulière et illégale; les parties devaient, au contraire, plaider ces défenses et obtenir jugement sur icelles avant que d'inscrire au mérite. Il exprima l'opinion que l'inscription au mérite pouvait être rayée, et la cause inscrite pour être plaidée sur la défense en droit, mais consentit, cependant, à entendre les parties sous réserves, et à leurs risques et périls; ce à quoi elles se soumirent, en invoquant toutefois l'usage constant, de procéder ainsi qu'elles l'avaient fait. L'action des demandeurs étant bien fondée fut maintenue.

"The Court doth dismiss the défense en droit, but without costs; inasmuch as the parties ought to have proceeded to argument upon it early, and had no right to reserve it for TOME XXIII.

hearing till the final argument on the merits. Considering that plaintiffs allegations are proved, doth condemn the defendant to pay," &c. (17 J., p. 227)

D'AMOUR & BERTRAND, pour les demandeurs.

G. MIREAULT, pour le défendeur.

MOTION POUR PERMISSION D'APPELER.

QUÉBEC, 7 décembre 1880.

Coram Dorion, J. en C., Monk, J., Ramsay, J.,

Cross, J., et Baby, juge suppléant.

ROY et GAUTHIER.

Jugé:—1° Que lorsque un associé poursuit un autre associé, en reddition de compte, il n'est pas obligé d'alléguer qu'il a lui-même rendu compte, ou qu'il n'en a pas à rendre, il lui suffit d'alléguer que le défendeur a en sa possession des biens ou sommes de deniers appartenant à la société qui a existé entre eux, dont il n'a pas rendu compte.

2° Qu'à défant par le défendeur de rendre compte dans le délai Axé par le jugement qui lui a ordonné de rendre compte, le demandeur put procéder à établir lui-même un compte d'après l'article 533 du cod de procédure civile, ou il peut, suivant la pratique suivie avant le code, faire condamner le défendeur à lui payer, soit une ou plusier s provisions, jusqu'à ce qu'il lui ait rendu compte, soit une somme définitive pour tenir lieu de reliquat de compte, à la discrétion de la Cour.

Les parties ont été en société, comme avocats et procureurs, et ils ont eu, en même temps, une agence d'assurance. Ils ont dissout leur société, et Roy, le demandeur, alléguant que le défendeur Gauthier avait reçu des sommes d'argent, pour la société, l'a poursuivi en reddition de compte. Gauthier a op-·posé à cette demande plusieurs exceptions, mais il a été finalement condamné à rendre compte, dans un délai d'un mois, sinon, à payer une somme de \$1,500 au demandeur. Le défendeur demande la permission d'appeler de ce jugement, pour deux raisons: 1° parce que l'intimé aurait dû, soit avant l'action, ou par son action, rendre un compte de la part qu'il avait e ue dans la gestion des affaires de la société, et des sommes qu'il avait reçues comme associé; 2° parce que le jugement nétait pas conforme à la loi, et que le défendeur ne pouvait pas être condamné à payer une somme quelconque, à défaut de rendre compte, mais que le demandeur aurait dû procéder à établir le compte, ainsi que le veut l'article 533 du code de procédure civile.

Baby, juge suppléant: Sur la première question soulevée par le défendeur Gauthier, la Cour est d'opinion que le défen-

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deur a reçu des sommes de deniers dans lesquelles le demandeur a droit à sa part comme associé, et qu'il peut demander une reddition de compte des sommes ainsi reçues, et qui, d'après ces allégations, sont en la possession du défendeur. Quoique le défendeur ait pu gérer la société avec le demandeur, il est possible, soit qu'il n'ait rien reçu, ou qu'il ait payé à son associé, sa part, et dans l'un et l'autre cas, il n'aurait aucun compte à rendre; mais il suffit au demandeur d'alléguer que son associé a reçu des sommes de deniers ou des biens sans lui en remettre sa part, pour avoir droit à une action en reddition de compte ou pro socio. Si alors, l'associé poursuivi prétend que le demandeur a lui-même reçu des deniers appartenant à la société, sans lui en remettre sa part, il doit alléguer ce fait, soit par exception péremptoire, ou par demande incidente afin de compte; mais, tant qu'il n'allègue pas que son associé est comptable envers lui, l'action en reddition de compte de ce dernier ne peut être repoussée. Sur le deuxième moyen, il est vrai que l'article 533 du Code de Procédure Civile permet au demandeur, lorsque le défendeur est condamné à rendre compte, et qu'il ne le fait pas, d'établir un compte en la manière indiquée par l'article 533, c.-a.-d. par chapitres de recettes et dépenses; mais ce mode de procédure sanctionné par le code, n'est que facultatif, comme on le voit par les termes mêmes de l'article 533, où il est dit: "Le demandeur peut procéder à l'établir (le compte) en la manière " portée dans l'article 523."

Cet article n'altère nullement le droit du demandeur en reddition de compte de contraindre le défendeur, par toutes les voies que de droit, a rendre un compte, et les Cours de Justice peuvent toujou s, comme cela s'est pratiqué de tout temps, condamner un défendeur, qui n'exécute pas la sentence qui le condamne à rendre compte, à payer une somme comme provision, ou comme pénalité, ou enfin pour tenir lieu de reliquat de compte. C'était la pratique sous l'ordonnance de 1667, et cela a toujours été pratiqué ici, même depuis le Code. La cour est donc d'opinion que ni l'une ni l'autre des raisons invoquées par le défendeur n'est suffisante pour lui permettre d'appeler du jugement qui l'a condamné à rendre compte, et sa motion est rejetée. Lors de l'argument, l'avocat du demandeur a prétendu que le jugement de la cour inférieure était devenu final par l'expiration du délai dans lequel le compte devait être rendu. Nous n'avons pas à décider cette question-là maintenant. Ce serait une raison de plus pour renvoyer la motion, car, si le jugement était final, le défendeur devait en appeler sans en demander la permission. Motion rejetée. (1 D.

de la C. d'A., pp. 96 et 149)
Bossé & Languedoc, pour le demandeur.

C. A. MORRISET, pour le défendeur.

BREF DE PROBIBITION.

COUR DU BANC DE LA REINE, EN APPEL,

Québec, 18 juin 1870.

Coram Caron, Drummond, Badgley, Monk, JJ., et Loranger, J. ad hoc.

CLARICE DUVAL, appelante, et NOEL HÉBERT et al., intimés.

Jugé:—Que le bref de prohibition existe, pour prohiber l'exécution du jugement des juges de paix, rendu en vertu du chap. 6 des S. R. B. C., sec. 22, imposant une amende de \$50, pour avoir vendu de la boisson enivrante sans licence.

Voici l'exposé de la cause par l'appelante : Alphé Laroche, cultivateur, de la paroisse de Saint-Norbert d'Arthabaska. avait fait extraire à sa pouliche, dans le mois de septembre, ou novembre 1867, une excroissance de chair, vulgairement appelée "les crapauds." Le chirurgien-vétérinaire lui avait recommandé de laver cette plaie avec du vitriol dissout dans l'alcool; non seulement pour guérir la plaie, mais pour empêcher la gangrène de s'y former. Laroche s'adressa au magasin de l'appelante, pour avoir du whisky, afin de faire dissoudre son vitriol; après avoir expliqué qu'il ne voulait ce whisky que comme remède, qui devait sauver la vie à son animal, la personne qui se trouvait présente, consentit à lui en laisser avoir, sur la provision de la famille, mais à la condition que le whisky serait mis sur le vitriol, avant de lui livrer. Laroche présenta alors une fiole dans laquelle était déjà le vitriol; le whisky fut introduit dans la fiole, et le vitriol aussitôt dissout, fut remis à Laroche qui paya cinq ou six sous pour ce trouble. Pour ce fait, l'appelante fut poursuivie par le percepteur du Revenu de l'Intérieur pour le district d'Arthabaska, Théophile Coté, sur l'information et délation de Messire Roy, prêtre et curé de la paroisse de Saint-Norbert d'Arthabaska, et fut condamnée, le 9 mars 1869, à payer une amende de \$50, dont une part devait profiter au délateur. Cette poursuite fut faite en vertu du chap. 6 des Statuts Refondus B. C., quand cet acte n'avait plus force de loi, dans la paroisse de Saint-Norbert d'Arthabaska, pour la poursuite d'infraction aux lois du Revenu, puisqu'il était remplacé par l'acte de tempérance de 1864, en vertu d'un règlement du Conseil Municipal local, à compter du 1er mai 1867, au 30 avril 1868. Lorsque le curé cût connaissance de l'affaire en question, il s'était écoulé au-delà de trois mois. 1er moyen: La plainte qui fut signifiée à l'appelante, pour comparaître devant les deux Juges de Paix,

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avait été d'abord faite, comme il est facile de le constater, contre Philippe Napoléon Pacaud, l'époux de l'appelante: on y a biffé son nom, pour ensuite le remplacer par celui de son épouse : c'était un moyen de rendre la chose encore plus outrageante: et, si on compare cette pièce avec l'original produit par le percepteur du Revenu, le 26 septembre 1868, on y trouvera les mêmes changements faits après coup. Or, le chap. 6 des Statuts Refondus du B. C., sect. 41, exige que la plainte soit signée par le percepteur du Revenu: Paley, on Convictions, page 54. Or, ni l'original de la plainte ni la copie ne sont signés par T. Coté, le percepteur du Revenu. Ce fait est établi par Felton, avocat. Ainsi l'appelante n'était pas tenue de répondre à cette sommation. La Cour Supérieure a émis, sur cette question, la doctrine que l'appelante aurait dû s'inscrire en faux contre cette plainte. L'inscription en faux n'existe pas dans le droit anglais, pour ces sortes de procédures qui sont nées du droit anglais. Ce sont des brefs de privilège connus de deux seuls peuples, les anglais et les américains; ce sont des brefs, résultats nécessaires des libertés individuelles et publiques. Cette signature n'est pas celle du percepteur du Revenu, c'est ce que les anglais appellent "forgery." Coté dit bien, dans son examen comme témoin, que les plaintes produites par l'appelante, le 22 septembre 1868, sont signées par lui. Pourquoi n'a-t-il pas dit que la plainte, qui fait le sujet de la présente instance, était aussi signée par lui? Si on compare les signatures à la plainte produite le 22 mai 1868, et les plaintes produites le 22 septembre 1868, le faux est hors de doute. Coté n'a pas voulu signer ce document; il savait que l'acte de tempérance de 1864 était en force; que cette poursuite devait être faite en vertu de cet acte, et il ne voulait pas consentir à ce qu'elle fut fait en vertu du chap. 6 des Statuts R. B. C., dans la crainte d'être censuré par ses supérieurs, mais le curé insistait pour avoir son amende. Coté laissa faire; son nom fut signé par un tiers, et la poursuite eût lieu, suivie d'une condamnation. Comme ces faits étaient notoires, pourquoi répondre à une sommation qui n'était réellement pas faite par le percepteur du Revenu, quand, dans le fait, personne ne poursuivait? Il n'y avait donc pas nécessité de répondre; ainsi, ce seul moyen était suffisant pour obtenir la prohibition. 2e moyen. L'acte de tempérance de 1864 décrète, par la 11e sect., que "nulle per-" sonne ne sera passible, en raison de ce qu'elle n'aura pas de "licence de cette description, à l'amende de \$50, imposée par " la 22e sect. du chap. 6 des Statuts Ref. du B. C." Cette loi était donc une protection et une sauvegarde contre la poursuite intentée en vertu du chap. 6. Or, pourquoi l'appelante se serait-elle occupée de cette poursuite qui n'était plus faite

en vertu d'un statut qui avait force de loi? La Cour Supérieure dit que l'appelante aurait dû comparaître devant les juges de paix, et plaider l'acte de tempérance de 1864, mis en force de loi par le règlement du Conseil Municipal: étrange doctrine: voilà qu'il faut plaider, qu'une loi sur laquelle est appuyée une poursuite, n'a plus force de loi: mais n'est-ce pas au poursuivant à le savoir? Avant de poursuivre, n'était-il pas obligé de s'assurer si la loi existait? Le percepteur du Revenu connaissait longtemps avant l'institution de cette poursuite, l'existence de ce règlement, dont il avait eu une copie en bonne et due forme. Les Juges de Paix le savaient tous de même. Si une personne était poursuivie et condamnée, par défaut, en vertu du chap. 6, pour avoir vendu des boissons spiritueuses depuis au-delà de six mois, ou avec licence, d'après la décision de la Cour Supérieure, cette condamnation, serait irrévocablement prononcée; la personne condamnée ne pourrait plus se faire relever de ce jugement in que et illégal. Les brefs de prérogative ne sont-ils pas pour remédier à toutes ces erreurs, et protéger les citoyens contre toutes ces injustices? Ici, nous avons le spectacle d'une double condamnation, en vertu de deux statuts qui se repoussent, se répudient, et qui ne peuvent exister dans le même temps. L'appelante savait qu'en vertu de l'acte de tempérance de 1864, la prétendue offense était, au pis aller, prescrite et limitée; pourquoi s'occuper alors de cette poursuite? Résumé: L'exécution de cette condamnation devait donc être prohibée: parce qu'elle avait été faite en vertu du chap. 6, qui n'avait plus force de loi, et parce que l'offense prétendue était limitée, prescrite et mise au néant par l'acte de tempérance de 1864. Ce moyen était encore à lui seul suffisant pour obtenir la prohibition. 3e moyen. Le chap. 103 des Statuts Refondus du Canada, qui est le Code de Procédure des magistrats, exige, sect. 24, que la dénonciation soit faite sous serment; elle n'est pas même signée, dans l'instance actuelle. A part cette nullité absolue, la preuve faite devant les Juges de Paix était insuffisante pour condamner l'appelante. Il fallait faire prouver, par le témoin, pour quelle fin il avait acheté ce whisky, afin d'établir qu'il avait été vendu "con-" trairement à l'intention et au sens véritables de l'acte," sect. 22, chap. 6, S.R.B.C. Les tribulations de la Cour Supérieure ont été provoquées par la sect. 49 chap. 6, qui dit: "Nul jugement " ou conviction rendu sous l'autorité du présent acte, ou nul "jugement en appel ne pourra être évoqué par certiorari, ou " autrement, devant aucune des cours de record de Sa Majesté "dans le Bas-Canada." Les faits qui résultent de la preuve testimoniale faite par l'appelante, peuvent se résumer à ceux-ci: 1º Que la boisson vendue par l'appelante au témoin

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ner à émoin Laroche, le neuf septembre 1867, l'aurait été pour faire des remèdes au cheval du témoin; 2º Que la déclaration annexée à la sommation des Juges de Paix signifiée à l'appelante, n'était pas de la propre écriture et signature de l'intimé Coté; 3° Que le témoin Laroche, devant les Juges de Paix, comme date de l'offense, aurait d'abord dit, neuf de novembre, et ensuite neuf de septembre. C'est donc sur ces différentes procédures faites par l'appelante et l'intimé, en Cour Supérieure, qu'a été rendu le jugement du 13 février dernier, dont se plaint l'appelante. La Cour Supérieure, par son jugement, a maintenu les prétentions émises par l'intimé, savoir : 1° Que, dans le cas actuel, la loi défendant l'émanation du bref de prohibition, de même que celui de certiorari, cette cour ne pouvait intervenir, pour casser la conviction, à moins que le Tribunal Inférieur ne fut illégalement constitué, ou que la jugement fut obtenu par fraude; 2° Que, dans le cas actuel, les Juges de Paix avaient jurisdiction sur la matière et sur la personne, qu'il n'y avait pas lieu alors à la requête en prohibition; 3° Que la preuve faite par l'appelante, sur sa requête, était illégale et inadmissible, l'appelante ne pouvant prouver contre, ou expliquer le dossier devant les Juges de Paix, pas plus que de faire une preuve qu'elle aurait dû faire devant eux; 4° Que cette preuve fut-elle légale ou admissible, elle ne suffirait pas pour maintenir les conclusions de la requête libellée de l'appelante, en autant qu'elle ne fait ressortir aucun excès ou manque de jurisdiction de la part des Juges de Paix siégeants.

L'intimé Coté, prétend que, dans le jugement dont est appel, il n'y a pas mal jugé; l'intimé fonde son opinion sur les quelques raisons suivantes: 1° Parce que les Juges de Paix, Hébert et Paradis, qui ont prononcé la conviction contre l'appelante, avaient jurisdiction sur la matière; 2° Parce qu'ils avaient aussi jurisdiction sur la personne; 3º Parce qu'il appert, à la face de leurs procédés, qu'en rendant leur conviction, ils n'ont aucunement excédé cette jurisdiction; 4º Parce que le bref de prohibition, de même que le bref de certiorari, ne s'accorde que quand le tribunal inférieur a excédé sa juridiction, mais non pour corriger de simples erreurs commises dans l'exercice de ses pouvoirs; 5° Parce que le bref de prohibition de même que le bref de certiorari, est dénié par la loi dans de semblables cas; 6° Parce que la procédure des juges de Paix est régulière, et la preuve faite devant eux est suffisante pour baser une condamnation; 7º Parce que la preuve faite par l'appelante est illégale et inadmissible, et ne peut et ne pouvait être faite sur un bref de prohibition; 8º Parce qu'enfin l'appelante était coupable de l'offense à elle imputée, et qu'en la condamnant les Juges de Paix n'ont fait que leur strict devoir.

Le jugement de la Cour Supérieure, district d'Arthabaska, Polette, J., est comme suit : "La Cour considérant, 1. Que la demanderesse n'a pas prouvé les allégations essentielles de sa déclaration, ou requête libellée, mais qu'au contraire il est établi qu'une déclaration portant le nom de Théophile Coté, comme signature au bas d'icelle, et soutenue par lui devant les Juges de Paix et devant cette Cour, a été faite et signée avec la sommation à la demanderesse, et qu'une preuve a été faite devant des Juges de Paix touchant les faits énoncés en cette déclaration, preuve que les Juges de Paix ont seuls l'autorité d'apprécier. 2. Que la demanderesse ne pouvait pas plaider, ni apporter devant cette Cour, comme elle l'a fait, le règlement du Conseil de la Municipalité de la paroisse de St-Norbert d'Arthabaska, parce qu'elle ne l'a pas plaidé ni produit devant les juges de Paix, et qu'il ne paraît pas par la preuve faite devant ces derniers, qu'il ait même été question d'un tel règlement. 3. Que la preuve faite devant cette Cour, de la part de la demanderesse, tendant à établir l'existence de ce règlement, et à contredire et détruire la preuve faite devant les Juges de Paix, est illégale et inadmissible. 4. Que, d'après les documents produits devant cette Cour, et, nommément, le jugement ou sentence rendu par les Juges de Paix, Noël Hébert et Edouard Germain Paradis, et dont le bref de prohibition a pour but d'empêcher l'exécution, ces Juges de Paix avaient pleine juridiction sur la matière et sur les personnes y mentionnées, et qu'il ne paraît pas y avoir un excès de juridiction; qu'ainsi la den anderesse ne peut pas obtenir les fins pour lesquelles le bref de prohibition a été décerné; considérant, d'ailleurs, que la poursuite, sur laquelle a été rendu le jugement ou sentence dont le bref de prohibition a pour but d'empêcher l'exécution, a été faite sous l'autorisation de l'acte des Statuts Refondus pour le Bas-Canada, chapitre six, et que, par la section 49 de cet acte, le dit jugement ou sentence ne peut pas être apporté devant cette Cour pour y être examiné et revisé, par le bref de prohibition, pas plus que par celui de certiorari; attendu qu'il ne paraît pas qu'il y ait un défaut ou excès de juridiction dans les Juges de Paix, ni que leur tribunal ait été illégalement constitué, ni que leur jugement ou sentence ait été obtenu par fraude, sur les causes pour lesquelles un tel jugement ou sentence peut être examiné par cette Cour, lorsque ces brefs sont dénié par la loi; et que ces brefs sont également déniés par l'acte 27-28 Victoria, chapitre 18, section 36, qui amende celui précité; qu'ainsi le bref de prohibition émané ne peut pas être maintenu; déboute la demanderesse, Clarice Duval, de son action et de sa déclaration, ou requête libellée; ordonne qu'il émane de cette Cour un bref de con-

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envers Théophile Coté." Ce jugement a été renversé par la Cour d'appel, 18 juin 1870. Le jugement est motivé comme suit : "The Court, considering that appellants, by their petition, in the nature of requête libellée, for a writ of prohibition, did allege and set forth facts which, if proved, were and are sufficient in law to obtain the conclusions of their petition, in so far as the same relate to the issuing of a writ of prohibition and the maintenance thereof; Considering that, in consequence of the filing of the défense en droit to the said petition, the Superior Court for the district of Arthabaska did, on the sixteenth day of May, 1868, by interlocutory judgment, or ler proof of the allegations of the petition, avant faire droit upon the conclusions of the petition, and that the said interlocutory judgment was made and rendered in conformity to law and the practice of the Superior Court; Considering that the evidence adduced under the said interlocutory judgment of the sixteenth day of May, 1868, is relevant and in all respects legal testimony, in so far as the same tends to establish and prove that the condemnation by the Magistrates Noel Hébert and Edouard Germain Paradis, on the ninth day of March, 1868, was obtained by fraud, and that the magistrates had no cause, inasmuch as no complaint had been made before them, or any other magistrates, either under oath or otherwise, and that the evidence adduced under the said interlocutory order, by the Superior Court, conclusively established the fact of the alleged fraud and the complete absence of jurisdiction in the magistrates; Considering, therefore, that, in the judgment of the Superior Court, rendered on the thirteenth day of February, 1869, dismissing appellant's petition, for the reasons therein assigned, and annulling the writ of prohibition issued, there is error, which judgment this Court doth annul, set aside and make void, and, proceeding to render the judgment which the Superior Court should have rendered, doth grant the conclusions of the petition for a writ of prohibition, and doth maintain the writ thereon issued, as prayed for in said requête, to all and every

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E. L. PACAUD, pour l'appelante.

L. P. E. CRÉPEAU, pour les intimés.

TUTOR .- ACTION TO ACCOUNT.

SUPERIOR COURT, Montreal, 20th September, 1872.

Coram TORRANCE, J.

BUREAU vs MOORE.

Held: 1° That it is not competent to a minor become major, or his assignee, to bring an action against his tutor, for a specific sum of money which appeared by the tutor's account, pending his administration as tutor, to be a reliquat due by the tutor at a specified date during the administration.

2° That until the rendering of the account as tutor, the only action by the minor become major against his tutor arising out of the admi-

nistration was the actio tutelæ directæ.

The plaintiff brought his action, to recover £227.4.7, alleged to be due him by defendant, on a transfer of a reliquat de compte, due by defendant, as tutor to his son, Terence Moore, junior, according to an account made by defendant before J. O. Bureau, N.P., on the 27th May, 1867. The defendant met the action by an exception, to the effect that he did not, on the 27th May, 1867, render a definitive account of his administration, as tutor to his son, Terence Moore, who was then a minor, and remained a minor until the 15th June, 1870. when only the administration ceased; that, until a definitive account has been rendered to Terence Moore, junior, now become of age, and duly accepted by him or adjusted, it was impossible to establish the sum really due. That the only action, therefore, which lay against defendant, by reason of his administration, as tutor to Terence Moore, junior, was one of account, and the present action was wrongly brought.

PER CURIAM: The relation of defendant to his son was that of mandataire to mandant. That relation existed until the majority of the son, on the 16th June, 1870, and the action arising out of the relation was the actio tutelae directae. Pothier, Mandat, No. 37: Le mandataire contracte par le contrat de mandat l'obligation:—10 de faire l'affaire qui en est l'objet, et dont il s'est chargé; 20 d'y apporter tout le soin qu'elle exige; 30 d'en rendre compte." No 61: "De l'obligation que contracte le mandataire par le contrat de

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compte : l'autre contraire, qui compète au mandataire, pour se faire rembourser les dépenses qu'il a faites." 2 Pigeau, p. 27: "Lorsque la tutelle finit, le tuteur doit un compte de l'administration des biens du mineur." Meslé, Minorité, p. 289: "La tutelle ou la curatelle étant finies, le tuteur ou le curateur, ou leurs héritiers, doivent rendre compte de leur gestion au mineur ou à ses héritiers, et en payer le reliquat; &c... le mineur après que la tutelle est finie, peut demander compte an tuteur ou curateur et se faire payer le reliquat, etc. L'action de tutelle ou demande en reddition de compte contre le tuteur, ne peut être formée qu'après la tutelle finie, etc." C.C. Canada, 308: "Every tutor is accountable for his administration when it has terminated." C. C. Can., 1713: "The mandatory is bound to render an account of his administration, etc." (This is under head of obligations of the mandatory.) C. C. 309 also gives a right to periodical accounts. "Ces comptes ne sont que pour instruire les parents de l'état de la tutelle et pour les assurer de la fidélité du tuteur; ils ne doivent être qu'un bref état de la recette et de la dépense." Meslé, Part 1., cap. 12, p. 372, n° 2, C. C. 311: "Every settlement between a minor become of age and his tutor, relating to the alministration and account of the latter, is null, unless it is preceded by a detailed account, and the delivery of vouchers in support thereof." Ferrière, Dict. de droit : "Reliquat de compte est le reste ou débit dont le rendant compte se trouve débiteur par la clôture et arrêté de son compte, toutes déductions faites. Ainsi par reliquat l'on entend ce que le comptable doit par l'arrêté et clôture de son compte, quand la mise doit à la recette, pour avoir été moins mis et dépensé que reçu." The judgment of the Court was as follows: "The Court, considering that defendant became tutor to his son Terence Moore, then aged nine years, by acte of appointment of date 4th April, 1859, and his administration as tutor continued until the 16th June, 1870, when Terence Moore, the son, attained his majority; Considering that the acte of date the 27th May, 1867, J. O. Bureau, Notary Public, was not a final account between the defendant and his said son, being then still a minor, and was not accepted by his son or by any person on behalf of his son; Considering that the said acte did not establish any indebtedness on the part of defen lant towards his said son at a later date or on the 28th April, 1871, date of the transfer by Terence Moore, the son, to plaintiff; Considering that the

only action competent to the son arising out of the defendant's said administration was an action for an account, actio tutelae directae, against defendant; doth dismiss plaintiff's action, with costs." (17 J., p. 235)

DORION, DORION & GEOFFRION, for plaintiff.

J. S. C. WURTELE, for defendant.

ASSURANCE.

SUPERIOR COURT, IN REVIEW.

Montreal, 28th February, 1873.

Coram Mackay, J., Torrance, J., Beaudry, J.

LAFARGE vs THE LIVERPOOL, LONDON AND GLOBE INSUR-ANCE CO.

Held:—That the preliminary proofs, under a fire policy, made after the 15 days within which the conditions endorsed thereon required the same to be furnished, are sufficient, and specially so when the conditions state, after the provision as to the 15 days, that "until" such proofs are made no right of action shall accrue.

MACKAY, J.: On the 17th June, 1871, plaintiff insured, at defendants' office, a house at Upton, for \$2,000, and a stable, for \$200. The policy was granted upon a written application, in which the cash value of the house was stated to be \$3,000, and of the stable \$300. On the 10th October, 1871, the house was destroyed by fire, and plaintiff is suing for the insurance money. The defendants plead fraudulent over-valuation by plaintiff of the subjects insured; fraudulent false representations of value in the application that, in September, 1871, plaintiff, by deed, bound himself to sell the buildings and land to one Boisvert, for \$2,000, and plaintiff was to disinterest the tenant, by paying him \$200; that, shortly before the fire, plaintiff made use of language indicating a fixed purpose to burn the property, to realize the insurance money. Another plea sets up the tenth condition of policy, requiring notice, by the insured, in writing, forthwith after a fire, and delivery within fifteen days of a particular account of loss, verified by his oath, and, in case of buildings and machinery, by certificates under oath of practical architects or builders, and says that plaintiff never complied with this condition, and the policy stipulated against any waivers, and none were. Another plea sets up the same condition no 10, and its provisions against false swearing upon claims, and says that plaintiff did make fraudulent claim. The plaintiff answers by denying the

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imputations against himself and his claim, says that defendants knew all about the buildings before assuming risk, &c., that due notices were given of fire and loss, &c. The case was tried before Mr. Justice Beaudry and a jury. Fifteen questions were put to the jury; these are not such as I would have settled, had I had time allowed me; they were put before me, at the last minute, while I was on the Bench, on judgment day, the parties declaring to have arranged them to their mutual satisfaction, and praying me to accept them, and fix, then and there, a day for the trial. questions now calling for attention, particularly, are the following: "3rd. At the date of the application, what was the actual cash value of the several buildings mentioned in the application?" The jury answered: "The testimony, on this point, is contradictory, but the jury are of opinion, upon what appeared to them the most reliable evidence, that a cash value is established of \$3,000, for the house destroyed, and \$300, for the stable; and this estimate was accepted by the insurers when issuing the policy as the cash value of the insured property, and the jury consider this conclusion as the correct cash value at the application." "6th. Did plaintiff, after the insurance, at any time before the fire, use expressions indicating an intention to destroy, by fire, the said premises, or to avoid the payment of the \$200, meaning to the tenant?" A .- "No.' "7th. Was notice of the fire given to defendants, by plaintiff, within the delay required by the policy, and when, and in what manner?" A.—" Yes on 10th October, 1871, to the sub-agent Thurber, as per document C. receipt of which was acknowledged by Smith, the manager, on 13th October, 1871; and also by document D transmitted by said sub-agent to Smith, on or about the 19th October, 1871." "8. Did plaintiff deliver, within fifteen days after the fire, to defendants or their secretary, an accurate and particular account of the loss caused by the fire, supported by vouchers and certificates of practical architects or builders and mechanics, verified by solemn oath or affirmation, and if not within 15 days, state in what manner and when?" A .- "Yes, as by document D." "9. Were the affidavits required by the policy furnished to, and received by defendants, and state when and whose the affidavits?" A .- "The affidavits were in due form as per document D." 14. "Were any of the conditions of the policy waived by defendants, by any writing, &c?" A.—"No." 15. "Amount of plaintiff's loss?" A.—"\$3,000 (less \$250 value of foundation) \$2,750." The defendants have moved for a new trial, and we will take up their material reasons in order: 1st. The cash values found by the jury are unsupported by the evidence, and, in fact, contrary to the evidence, and the jury, "without any evidence," found that plaintiff's estimates had been accepted by defendants. All must admit that the question of value of the subjects insured is one of fact. In this case, there was evidence on both sides, conflicting evidence, upon this question. The jury find, upon these contradictions, that it appears to them that the values were \$3,000, for house, and \$300, for stable (i.e., they support plaintiff). Courts and judges might differ as to this upon the same evidence. I have great difficulty, considering the sale to Boisvert, and plaintiff's obligation to disinterest the tenant by paying him \$200, to see that the house burnt was worth \$3,000, or over \$2,000. I would probably have told the jury to reflect upon it with care. Yet, the defendants must submit to the jury's finding about it. Were we to hold otherwise, we would violate the principles governing jury trials. (See Hilliard, on New Trials, pages 340,341,345.) We cannot say that the verdict upon the point of value is unsupported by evidence. The jury report that the evidence is contradictory, but that so and so appeared to them, from what they considered, the most reliable evidence, &c. Why did defendants take plaintiff's premium? Why did they not examine the buildings before taking the risk? It is said that they did, and it is proved that plaintiff had insured before with defendants these very buildings. After the loss, why did they not make option to rebuild? They had a right to do this by a condition of their policy. The second reason in the defendants' motion is that the jury ought to have answered the sixth question in the affirmative. That question was as to whether plaintiff, before the fire, used expressions indicating intention to destroy his house by fire. The jury have answered in the negative. Upon this point two witnesses have sworn that plaintiff did use the language attributed to him; but they will not say that he meant it seriously, in the bad sense that defendants would have it. It is to be observed that the question referred to is not pertinent to any issue. There is no allegation that plaintiff set fire to his house, or that he gave defendants reason to suspect it. Supposing that speech proved, and that the jury were to find so; int he absence of the plea that the assured set fire to the house, or that defendants suspect so, what pertinence would the finding have? In the absence of an appropriate plea, all presumptions are to be of plaintiff's innocence. The plea states, among other things, bearing only upon the plaintiff's representations of value, that plaintiff said so and so, and it breaks off, leaving that allegation there, naked and alone. Under these circumstances, we are against defendants upon this part of the case. The third reason

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alleged for new trial is that the jury's finding, as to the notice in writing, by plaintiff, of the fire, was contrary to the evidence, document C relied upon by plaintiff not being such notice, but only defendants' agent's letter to them. The plaintiff did not literally give notice in writing of the fire. He informed defendants' agent, at Upton, of it, and asked him to notify the head office, which he did. The resident secretary got the agent's letter of notification, acknowledged it, and directed the agent to get plaintiff's proofs; the letters show this. We unanimously consider this a waiver of the condition requiring notice of the fire to be given by the insured in writing. The policy authorizes us to hold this waiver, the waiver is in the form appointed by the last condition of the policy. So, upon this point of the case, we are against the defendants. We pass to defendants' next three reasons, which are in substance connected, and charge that plaintiff did not make proof in writing, and declarations under oath, as to his loss, within fifteen days after the fire; that no proof was made of document D; that the learned judge, at the trial, improperly admitted as evidence documents D and F, without proof of the parties named in them having been sworn before the Justice of the Peace; and, that the judge misdirected the jury that the Justice's signature was complete proof of itself of his handwriting, and of the parties (deponents) having been swern. Document D is composed of affidavits dated 19 Oct., 1871, of four persons, two are carpenters, one a blacksmith. These affidavits have jurats to them, purporting to be signed by the Mayor of Upton, who is ex-officio a Justice of the Peace. The affidavits reached defendants within fifteen days of the fire, but plaintiff made none within that time. Document F is made up of a notarial notification to defendants, on the 6th February, 1872, at the request of plaintiff, accompanied by affidavits of plaintiff himself, and of two other men, as to plaintiff's loss and the value of the house burned. These affidavits all bear date 29th January, 1872, and purport to be sworn before a Justice of the Peace commissioned for receiving affidavits. The judge allowed these documents D and F to be fyled at the trial. as evidence, and held as to the jurats to the affidavits, that they proved themselves without other proof having to be of the attesting officers' handwriting, or of the affidavitmakers having been sworn. We are of opinion that the judge was not wrong. There are things judicially taken notice of. for instance, our constitution, the division of the country, our political agents, public officers, &c. The signatures purporting to be of Justices of the Peace to jurats, such as in documents D and F, have always been admitted as genuine, upon trials

of insurance cases, in the absence of proofs to the contrary. But there remains the question of whether, owing to plaintiff not having made any declaration under oath, within the 15 days after the fire, he has not forfeited the right of action. Is the term of 15 days a fatal period, or can plaintiff, though having fyled his declaration under oath only 3 or 4 months after the 15 days, recover? This is a difficult part of the case. The clause requiring declaration under oath within 15 days may be held to look directory or comminatory only; it reads at first to be absolute, but a later paragraph of it says: "and until such particular account, &c., shall be produced, the amount of loss shall not be payable." If, instead of the word "until," the word "unless" had been used, the 15 days would have been a terme de riqueur. Why has this paragraph been added to what precedes it requiring the declaration under oath in 15 days? It seems a qualification of it, and as if what was meant to be de riqueur, before any money should be payable, was the particular account under oath rather than the account within the 15 days absolutely. By condition 11. no money is payable before 60 days after adjustment of loss. A fortiori no money could possibly be recoverable within the 15 days. During the 15 days, never mind what proofs or oaths the insured might make, he could not pretend that anything was payble. "Shall not be payable" cannot refer to any kind of payment within the 15 days. It refers to some payment without, or outside of them, outside of 60 even, to be made on proofs being furnished. This condition then is ambiguous, and likely to mislead; so it calls for interpretation. The policy, and the conditions upon it, involve the stipulations of the two parties. The contract is an express one, with conditions for the benefit of the insurers, introduced by them, and obligation by the insurers for the benefit of the insured. By many of the conditions the insurer obliges himself to do things. If such obligations be ambiguous, interpretation of them must be in favor of the insured who obliged himself to do something. 1019 C. Civil L. C.; Pothier, Obl.; and so in the U.S., they hold that conditions of that kind are to be construed against those for whose benefit they are introduced. Catlin vs Springfield F. In. Co., 1 Summer's Rep. A clause of doubtful meaning is interpreted against him who got it put into the Act; he ought to have been more clear. He, for whose advantage or purpose a clause is put into an Act, is supposed to have put it in. Instr fac. sur les conv. p. 72. Conditions about proofs to be made with certain formality, and in a time stated, are for the purposes of the insurers; so they must be clear. Upon these principles, we think that plaintiff may be allowed to stand with his

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demand in Court, though his own declaration under oath was only delivered to defendants in February, 1872. We hold also that the jury's findings on the documents D and F ought not to be disturbed. The defendants' eighth reason reads in substance thus: Because the jury have found that no waiver in writing was by the defendants of any condition of the policy. This of itself or alone cannot be urged by defendants (in favor of whom the finding is) as substantive cause for new trial. This reason was meant perhaps to be connected with some other one, but is not. The tenth, eleventh and twelfth reasons involve substantially this: That plaintiff's representations in his application were warranties, and by reason of his gross exaggeration of values, fraud is to be presumed and the policy held null. Upon this it is necessary to say that the question of fraud has not been put to the jury; the question of values has been, and over-valuation is negatived; how can the Court, in the face of such things, hold the policy null as for fraudulent gross exaggeration? Insurers gain every day from over-valuations; there are over-valuations simple, and others fraudulent; provision is made against both in defendants' condition eleven. Here the jury find no over-valuation. Had there been one, it would have been fitting under this policy to put to the jury a question: Was such over-valuation simple or fraudulent? but none such has been suggested. The Court has considered all the other lesser reasons assigned by defendants, and upon the whole sees no reason to allow a new trial. Motion for new trial rejected. (17 J., p. 237; 3 R. C., p. 59) LAFLAMME, HUNTINGTON & LAFLAMME, for plaintiff.

EDW. CARTER, Q. C., for defendant.

RIGHT OF ACTION. - DECLINATORY EXCEPTION.

Court of Review, Montreal, 31st January, 1873.

Coram Johnson, J., Mackay, J., Beaudry, J.

LAPIERRE vs GAUVREAU.

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Held:-That when an order for goods has been given at Kamouraska to a travelling clerk, having commission to act from various houses in Montreal (including that of the vendor), and has been afterwards accepted by one of such houses, and the goods delivered at the depot, in Montreal, of the Grand Trunk Railway, and forwarded by that route to the purchaser residing at Kamouraska, the right of action originated at Montreal.

This was a hearing in Review of a judgment rendered in the Superior Court, at Montreal, on the 30th November, 1872, TOME XXIII.

(TORRANCE, J.,) maintaining an exception déclinatoire fyled by the defendant The action was brought to recover the price of goods alleged to have been sold and delivered by plaintiff to defendant, at Montreal, and was instituted at Montreal and served on defendant, at his domicile, in Kamouraska. The exception alleged that the sale and delivery really took place at Kamouraska, and that the right of action consequently originated there. The parties signed written admissions to the effect that the sale took place, "par l'entremise d'un commis voyageur, qui, ayant une commission de différentes maisons de commerce, et du demandeur, pour les ventes de marchandises qu'il leur procurait, en prenant des ordres ou commandes à cet effet comme commissionnaire, se serait présenté chez le défendeur, dans son district, et, là et alors, aurait pris de ce dernier la commande, ou l'ordre, pour les marchandises dont le prix est réclamé, et qui furent ensuite, au retour du commis voyageur chez le demandeur, empaquetées par ce dernier, en son magasin, en la cité de Montréal, déposées ensuite à la compagnie du Grand-Tronc de chemin de fer du Canada, en la cité de Montréal, et expédiées par cette voie, avec l'envoi ou bordereau (compte) au défendeur." The plaintiff relied on the following decisions: Thompson et al. vs Dessaint, 14 J., p. 184, et 20 R. J. R. Q., pp. 114 et 521; Joseph et vir vs Paquet, 14 J., p. 186, et 20 R. J. R. Q., pp. 116 et 521.

Here follow the remarks made by judge TORRANCE in ren-

dering the judgment of the Superior Court:

TORRANCE, J.: This case comes up on an exception declinatory. It is an appealable case, and I am sorry to be obliged to differ from my brother BEAUDRY. The point raised is the question as to what is meant by the cause of action. Some time ago, I decided that the "cause of action" meant the whole cause of action, and the "right of action" the whole right of action. Since that decision a case was decided in the non-appealable Circuit Court by Mr Justice Beaudry, taking a different view, and that being a non appealable case, I said, in a subsequent non-appealable case, that my objection to have contrary rulings in the same Court being very great, I would follow the ruling already made in the Circuit Court by Mr Justice Beaudry, reserving my right, when the question should present itself in an appealable case, to decide it as I think it ought to be decided. Following the decision therefore, which I have already given in Gault et al. v Wright et al., 13 J., p. 60, 1 R. L., p. 88, 19 R. J., R. Q., pp. 95 et 542, I hold that the declinatory exception must be maintained, the action not being brought where the whole right of action arose, or in the district where the parties reside.

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MACKA sile Harva sale made timothy sample sale, who to be by Railway, fyled The reason assigned in the judgment complained of was as follows: "Considering that the right of action set forth in er the plaintiff's declaration did not arise in the district of Montreal;" ed by The following was the judgment in Review: "The Court, Mont-Considering that there is error in the judgment of the 30th raska. day of November, 1872, to wit, in this that the declinatory took exception fyled by the defendant was maintained by the said consejudgment, whereas it should have been dismissed; Doth, admisrevising said judgment, reverse the same, and, proceeding to remise render the judgment that ought to have been rendered in the diffépremises; Considering that, by the admissions of the parties, ventes it is proved that the order for the goods, wares and merchanlres ou dise, for the price and value whereof the present action was it préinstituted, though sent from Kamouraska, was only accepted aurait and fulfilled at the City of Montreal, and that the right of rchanaction, therefore, originated at the last named place, were retour the contract of sale was completed; Doth dismiss the said par ce exception déclinatoire, with costs of both Courts." (17 J. p. sées en-241; 3 R. C., p. 78) fer du JETTÉ, ARCHAMBAULT & CHRISTIN, for plaintiff. te voie,

Dorion, Dorion & Geoffrion, for defendant.

SALE BY SAMPLE.

Court of Review, Montreal, 28th February, 1873

Coram Mackay, J., Torrance, J., Beaudry, J.

Desmarteau et al. vs Harvey.

Held:-That in the case of a sale of a given quantity of seed by sample where the bulk proves inferior to sample, the purchaser is not bound to accept the part which is equal to sample, but may repudiate the whole purchase.

This was a hearing in review of the Superior Court, at Montreal (Johnson, J.), rendered on the 30th Nov., 1872.

dismissing plaintiffs' action.

MACKAY, J.: The plaintiffs are merchants, in Montreal, and she Harvey, of Hamilton, Ont. They charge him as upon a sale made here in March, 1872, of about 450 minots of timothy seed, at \$2.85 the minot, of the same quality as a sample shown to defendant's agent, Evans, present at the sale, who declined to go and see the bulk. The delivery was to be by sending the seed to Hamilton, by the Grand Trunk Railway, in bags to be furnished by the defendant. Plaintiffs

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say that 417 32-45 bushels were sent, and more could not be. for want of bags; that the seed fell in price, and, afterwards, defendant would only offer \$2.35 per minot for what he had received. The conclusions are for \$1091.53. The defendant's plea sets up the memorandum of the sale and denies that plaintiffs fulfilled their contract, or that defendant accepted the seed; it says that the seed was not up to the sample, but very inferior; that defendant refused it, stored it for plaintiffs' account, notifying them of the facts. The judgment a quo has found that what was sent to defendant was inferior to the sample, and that no perfected sale has been; so the action has been dismissed. The plaintiffs appeal. At the argument before us, one point insisted upon was that the seed certainly was not all bad, that defendant ought to have been condemned to pay for so much of it as was good, and that, at most, only 70 bags are proved inferior. Authorities were cited. Our Civil Code, it was contended, supported the proposition that deficiency of quality being only as regarded a small part of what had been sold, as the purchaser would, probably, have bought without this part, he ought not to be allowed to rescind the sale in totality. I notice that, in the course of the proceedings, the sale is sometimes called sale of 225 bags of timothy seed, and sometimes sale of about 450 minots, while the contract reads as sale of one car load, say 450 bushels. The declaration alleges that defendant's agent declined, or did not think fit to examine the bulk; but the proofs establish that the bulk was not possessed by plaintiffs at the time of the contract; plaintiffs had to make it up afterwards by buying; they bought in lots of two to twenty minots to complete it. In March, the seed was sent to Hamilton in one lot, 225 bags, 70 of which were very inferior to the sample. Is plaintiffs' proposition that defendant can be charged with so much of the seed as was not inferior to the sample, sound? Can the seller of a large named quantity charge the purchaser upon a delivery of a lesser quantity, acceptation of what has been delivered having been refused? Suppose a contract for 1,000 bushels; seller sells 900, of which 200 are bad. The nine hundred are refused. Can the purchaser, nevertheless, be charged with the 700 admitted to be good? A car load of seed being sold, can the purchaser be held to accept a half or a quarter of a load? In the case in hand, defendant has right to say that his contract was one, and that entire performance of it had to be. See Champion vs Short, 1 Camp. Story, on Sales, sect. 376, says: "Where goods are sold by sample." "The exhibition of a sample is equivalent to an affirmation that all the goods sold are similar to it, and, if they be not, the vendee may rescind the

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contract." Another argument of plaintiffs was that, possibly, the sample had been tampered with by defendant. This we do not see. It was argued also that the proofs for plaintiffs are stronger than those for defendant. Plaintiffs' witnesses look somewhat interested; the strongest of them are those who bought the seed for plaintiffs to make up the bulk with. They do say that the seed is good, but others prove the contrary. There is evidence pro and con. That for defendant is strong. The Judge a quo has passed upon all, and not unreasonably; so his judgment is confirmed. Judgment of S. C. confirmed. (17 J., p. 244; 3 R. C., p. 64)

JETTÉ, ARCHAMBAULT & BÉIQUE, for plaintiffs.

CARTER & HATTON, for defendant.

PAITS ET ARTICLES.

SUPERIOR COURT, Montreal, 28th February, 1873.

Coram Johnson, J.

WALTERS vs LYMAN et al.

Held:—That when faits et articles are served on the attorney of one of the parties who is absent, the simple indication by such attorney of the place of residence of his client is a sufficient compliance with the provisions of Art. 223 of the Code of C. P., and that he is not bound to take steps to have his client examined under a Commission. (1)

PER CURIAM: This was a point which arose at enquête under 223 C. P. A party was absent, and his attorney thought it sufficient to indicate where his client was, without taking steps to have him examined. The Court thought the meaning of the Code was that when an attorney has indicated where his client is, it is at the diligence of the other party to have him served with the faits et articles. If the locality indicated were in the midst of the ocean or other place not easily accessible, that would be a case in which delay might be granted by the judge for the service of interrogatories. Acte granted to defendant of his designation of residence of Elisha S. Lyman. Acte granted. (17 J., p. 246).

DORION, DORION & GEOFFRION, for plaintiff. JOHN DUNLOP, for defendants.

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⁽¹⁾ Vide art. 361 C. P. C. de 1897.

PUBLIC ROADS.—RESPONSIBILITY OF MUNICIPAL CORPORATIONS.

COURT OF REVIEW, Montreal, 30th November, 1872.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

HIGGINS et vir vs The Corporation of the Village of Richmond.

Held:—That defendants were liable for damages suffered by the female plaintiff, by the up-etting of a sleigh on the highway under control of defendants, can-ed by the natural bank on such highway, notwithstanding that the roadway opposite the bank was wide enough for two teams to pass, and notwithstanding that the accident was more immediately caused by the horse taking fright at the sound of a railway whistle; the horse itself also being at the time driven by a female only 12 years of age.

This was a review of a judgment rendered by the Superior Court, at Sherbrooke, condemning defendants to pay plaintiffs \$120, besides interest and costs. The action was brought to recover the sum of \$5,310, for damages alleged to have been incurred by the female plaintiff, in consequence of the upsetting of a sleigh, in which she was being driven by a girl only 12 years of age, on the public road under the defendants' control. It was in evidence that, where the accident occurred, there was a natural mound round which it was necessary to drive, and that the level roadway opposite this mound was about 23 feet wide, and wide enough for two teams to pass. The up etting was said to have been caused by the sleigh striking this mound, and that the horse was a skittish one, and had been frightened by the sound of a railway whistle. The defendants contended that there was negligence on the part of the female plaintiff, in suffering herself to be driven by a girl of only 12 years of age, the horse too being a skittish one, and that the immediate cause of the accident was the sounding of the railway whistle, which had frightened the borse, and that, under the circumstances, they were not liable. Reference was made to Sleigh, Personal Wrongs, p. 103. Moffette vs. The G. T. R., 16th L. C. Rep., p. 231, 15 R. J. R. Q., p. 88 (1); Hilliard, on Torts, vol. 1, p. 140-142.

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faute de mandeur pable de maires et a vs Grand BADGLEY, Québe

⁽¹⁾ C'est un principe général que celui qui réclame des dommages causés par la faute grossière ou par la négligence du défendeur, soit à l'abri de toute imputation de négligence ou de manque de soin ordinaire, et qu'il n'a aucun droit d'action dans le cas où les dommages sonfferts seraient le résultat de la faute commune, plus particulièrement en l'absence de voies de fait ou de tort prémédité. (Moffette vs Grand Trunk Railway Company of Canada, C. S. R., Québec, 5 mars 1866, BADGLEY, J., STEART, J., et TASCHEREAU, J., confirmant le jugement de C. C., Québec, 16 D. T. B. C., p. 231, et 15 R. J. R. Q., p. 88.)

BEAUDRY, J., dissentiens: The action is for the recovery of damages caused by the upsetting of a sleigh. It is stated that the road is not level, that a mound exists, which it was the duty of the Corporation to have removed. Had that been done, the accident by which the female plaintiff and child were thrown from the vehicle would not have happened. As I read the evidence, defendants are not to blame. The road has existed in its present state for forty or fifty years, and the accident appears to have been caused, not by any obstruction in the road, but by the proximity of the railway, the whistle of which frightened the horse. I have therefore to dissent from the judgment of the

majority.

MACKAY, J.: The suit was brought for special damages, alleged to have been suffered by Mrs. Higgins or Steers. Her husband also sued for damages, but he has waived that claim, and he now stands in the suit simply for the purpose of authorizing his wife who is séparée de biens. The damages are charged as having been caused to Mrs. Steers by an obstacle in the roadway, near the railway station, a mound being permitted to exist, which, it is charged, it was the duty of the Corporation to have removed. It was alleged further that the Corporation had been warned to abate this mound, but they had neglected to do so. The defendants plead that the road is a good natural road; that no negligence of theirs contributed to the accident; that there was no obstruction except a natural inequality of the road. There was a further plea imputing negligence to the person driving the vehicle. In February, 1872, judgment went against defendants, finding that this imperfection in the roadway did exist, and awarding the sum of \$120 damages. If the defendants are liable, the condemnation must be considered very moderate, because the woman was seriously injured, and was

Celui qui réclame des dommages doit non-seulement prouver que les dommages réclamés ont été causés par la faute ou la négligence du défendeur, mais aussi qu'il n'y a pas eu manque de soin de sa part, ou que, s'il y a négligence de sa part, elle n'a pas contribué au tort dont il se plaint. Il doit aussi faire preuve qu'il y a eu de sa part précautions suffisantes au moment de l'accident. (Moffette vs Grand Trunk Railway Company of Canada, C. S. R., Québec, 5 mars 1866, BADGLEY, J., STUART, J., et TASCHEREAU, J., confirmant le jugement de C. C., Québec, 16 D. T. B. C., p. 231, et 15 R. J. R. Q., p. 88.)

Lorsque les demmages réclamés ont été causés par une personne dans l'exercice de ses droits légaux, celui qui les réclame doit prouver qu'il n'y a pas eu faute de sa part et qu'il y a eu négligence de 'r part du défendeur. Le demandeur n'a pas droit d'action, lors même que le défendeur aurait été coupable de négligence grossière, si lui-même a montré un manque de soins ordinaires et a ainsi essentiellement contribué au tort dont il se plaint. (Mossette vs Grand Trunk Railway Company of Canada, C. S. R., Québec, 5 mars 1866, BABGLEY, J., STUART, J., et TASCHEREAU, J., confirmant le jugement de C. C., Québec, 16 D. T. B. C., p. 231, et 15 R. J. R. Q., p. 88.)

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confined to her house for a long time. The majority of the Court think the judgment is right in holding defendants liable. We do not say that municipalities are obliged to reduce all their roads to levels, but we say this is a particular case. Other accidents had taken place at the same spot. There had been numerous upsets there, and notice had been given to the defendants to remove this mound out of the roadway. It is proved that the mound is a very peculiar feature in the roadway, and a manifest obstruction. The fright of the horse, caused by the whistle of the train, is said to have been the primary cause of the accident, but we do not find it so. Other accidents happened at the same place without the railway having anything to do with them. There was a slight upset there about a week after the accident to the plaintiff. Suppose the horse was a little skittish at the whistle of the railway, we do not think that was the primary cause of the accident, or that it can be considered there was fault or contribution by the plaintiff, so that she is to lose her damages. In many cases, even where there is contribution by the plaintiff to the accident, and the contribution is very small, plaintiff is not to lose his damages. Under the circumstances, therefore, the judgment ought to be confirmed. Judgment of S.C. confirmed. (17 J., p. 246; 2 R. C., 476)

W. BROOKE, for plaintiffs.

HALL and WHITE, for defendants.

SUBROGATION LEGALE.

COUR SUPÉRIEURE, St-Hyacinthe, 27 février, 1873.

Coram SICOTTE, J.

LAVALLÉE vs Tétreau, et Roy, opposant et colloqué, et LAVALLÉE, contestant.

Jugé:—1. Qu'avant le code, la subrogation légale, sans demande, était accordée à l'acquéreur qui employait son prix au paiement des créancier : uxquels cet héritage était hypothéqué, et qui était ensuite évincé pour cause non dérivant de lui, et ce, quand même il aurait été chargé par son acte d'acquisition de payer tels créanciers.

2. Que la revente volontaire par le premier acquéreur, après avoir ainsi payer les créanciers inscrits, et l'éviction par vente judiciaire sur le second acquéreur, à la demande de créanciers hypothécaires antérieurs à l'acquisition du premier acheteur n'ont pas eu pour conséquence de nullifier la subrogation.

PER CURIAM: Le jugement dépend de la solution des deux questions suivantes: 1° Avant le code, la subrogation légale

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leux gale était-elle accordée à l'acquéreur qui employait son prix au paiement des créanciers auxquels cet héritage était hypothéqué, et qui pouvait lui avoir été indiquée par la vente? 2° Toutefois telle subrogation admise, la revente volontaire par le premier acquéreur, après avoir ainsi payé les créanciers inscrits, et l'éviction, par vente judiciaire, sur le second acquéreur, à la demande des créanciers hypothécaires antérieurs à l'acquisition du premier acheteur, ont-ils eu pour conséquence de nullifier la subrogation? Les auteurs traitant de la subrogation légale, commencent invariablement par déclarer que c'est une question épineuse, et on est fort amusé de voir avec quelle superbe ils parlent parfois les uns des autres, grands ou minces jurisconsultes. Cela fait peine, quand on compare leurs contradictions et le résultat de toutes ces discussions, dans la pratique et même la jurisprudence. Larombière, qui, presque toujours, évite ces écarts et ces éclats de dissidence, a rendu compte d'une manière exacte de l'opinion qui prévalait. "Les principes, dit-il, sur cette " matière importante, n'étaient pas fermement arrêtés avant " la promulgation du code. Quelques textes combinés du "droit romain, des décisions d'arrêts en contradiction, des " opinions d'auteurs en lutte avaient été impuissants à fon-" der un corps de doctrine bien lié, une théorie logique et " conséquente. Notre ancienne législation sur ce point méri-" tait donc d'être acceptée en quelque sorte sous bénéfice d'inventaire." Guyot avait parfaitement analysé, dans son Répertoire, ces textes du droit romain, ces arrêts en contradiction, et ces opinions d'auteurs en lutte. Merlin ne pouvant faire mieux, l'a copié textuellement dans son répertoire. (Citation de Guyot) La citation qu'on vient de faire constate que les jurisconsultes les plus estimés avant cette époque se prononçaient en faveur de la subrogation légale dans l'espèce que nous discutons. Le président Fabvre qui la refusait en théorie, la concédait à tous les effets dans la pratique. Domat déclarait qu'elle était acquise à l'acquéreur. Page 214, nº 7. "L'acquéreur d'un héritage employant le prix de son acquisition au paiement des créanciers à qui cet héritage était hypothéqué, est subrogé à leurs droits, jusqu'à concurrence de ce qu'il leur paie, car, en les payant du prix de leur gage, pour se l'assurer, il se le conserve jusqu'à la concurrence de ce qu'il leur paie, contre d'autres créanciers subséquents, quoique antérieurs à son acquisition." Jourjon s'exprime aussi dans le même sens (pp. 741 et 742, lans le vol. 2, n° 197): "Outre la subrogation conventionnelle, il y a plusieurs cas dans lesquels la subrogation s'acquiert de plein droit, et par la seule disposition de la loi. Ces subrogations produisent le même effet que la conventionnelle." No 198: "L'acquereur qui, pour conser-

ver l'héritage par lui acquis, paie les créanciers qui ont hypothèque sur icelui, est de droit et indépendamment de toutes conventions subrogé à l'hypothèque des créanciers." Il est subrogé à plus forte raison, s'il paie au créancier délégué. No. 200: "Des deux propositions précédentes, il s'ensuit que si par la suite l'acquéreur est forcé de déguerpir ce même héritage, il est, pour ce qu'il a payé à ces créanciers, tant délégués que simples hypothécaires, colloqué suivant l'hypothèque de ces mêmes créanciers. C'est pour se maintenir en possession qu'il a payé, il est donc juste que, dans le cas que, nonobstant ces paiements, il se trouve forcé de déguerpir, de lui accorder la subrogation à l'hypothèque des créanciers qu'il n'a payés que par l'effet et la force de "l'hypothèque." Renusson, le seul qui ait fait un traité particulier sur la subrogation, est aussi emphatique que les auteurs qu'on vient d'indiquer, dans l'opinion qu'il émet en faveur de cette subrogation légale au profit de l'acquéreur qui paie son prix aux créanciers de son vendeur. "Pareillement, quand un acquéreur est chargé, par " son contrat d'acquisition, de payer au créancier de son ven-" deur, et qu'il paie en exécution de son contrat le créancier, " il est subrogé de plein droit. Les lois romaines ont trouvé " juste que tel acquéreur succède de plein droit, et entre au " lieu et place du créancier qu'il a payé, et que, comme subro-" gé, il puis-e se défendre contre les créanciers postérieurs qui " voudraient le troubler, ou s'il est contraint de déguerpir " l'héritage, pour être vendu par décret, il doit être colloqué " et mis en ordre, suivant l'hypothèque du créancier qu'il a " payé, de même qu'aurait pu être le créancier s'il n'avait pas "été par lui payé." Pothier se prononce contre cette subrogation comme découlant de pluno de la loi civile, mais voici comment cet éminent légiste l'accorde toutefois au tiers acquéreur; traité des obligations, vol. 2, (Bugnet), Traité des Obligations, n° 558, par. 3: "A l'égard du tiers détenteur d'un héritage, qui, pour en éviter les délais, a payé la dette à laquelle son héritage était hypothéqué; si, en payant, il a manqué de requérir la subrogation aux droits du créancier, il ne sera pas à la vente subrogé à tous les droits du créancier; mais il pourra au moins, selon nos usages, les exercer sur cet héritage dont il est détenteur, contre tous autres créanciers à celui qu'il a payé. Car, en libérant l'héritage de cette hypothèque, meliorem fecit in eo fundo caeterorum creditorum pignoris causam; ce qui lui donne contre eux exceptionem doli, pour retenir ce qu'elle a payé, et pour libérer cette hypothèque: la bonne foi ne permet pas qu'ils profitent à ses dépens de cette libération : Dolo faciunt, si velint cum ejus damno locupletari. Ce cas est semblable à celui auquel le détenteur d'un héritage sujet à des hypothèques, y a fait des

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améliorations." Pothier n'était pas satisfait de l'interprétation qu'on donnait à certains textes romains, mais basant son opinion sur la règle de toute justice et de toute loi, que nul ne peut s'enrichir du bien d'autrui, il assure à l'acquéreur, exceptionem doli à l'encontre des créanciers, pour lui permettre de reprendre sur l'héritage, ce qu'il a payé. La bonne foi ne permettant qu'ils profitent à ses dépens de la libération de dettes qui étaient privilégiées ou antérieures, "dolum faciunt," il y aurait dol de la part de ses créanciers, or cela ne peut être. Ainsi, d'après le président Fabvre, et d'après Pothier, d'accord sur ce point, avec presque tous les jurisconsultes, la subrogation légale était accordée à l'acquéreur d'une manière efficace et constante, tant comme chose admise par le droit civil que comme chose découlant du droit naturel, et sanctionnée par la jurisprudence, et par les usages, comme le disait Pothier. Telle était la constitution légale de la matière lors de la promulgation de notre code. S'il n'y avait pas d'incertitude sur le recours accordé à l'acquéreur dans la pratique et d'après les usages, pour le sauvegarder contre toute perte, il pouvait apparaître que la doctrine n'était pas admise avec la même unanimité d'opinion et la même certitude. Cela justifierait, peut-être, les codificateurs d'indiquer comme droit nouveau, la subrogation légale de l'acquéreur qui fixe son prix pour acquitter les hypothèques qui grèvent le fonds. Comme il a été remarqué, il y avait plus de subtilité dans ces dissidences que de réalité. La subrogation s'exerçait au profit de l'acquéreur, d'après l'usage, sur l'héritage, à l'encontre des créanciers pos térieurs, qu'on déboutait de leur opposition comme entachée de dol. D'ailleurs, il y a dans notre code, une disposition, nullement énontiative de droit nouveau, qui accorde tout l'effet de la subrogation léga'e au profit du détenteur qui a acquitté des créances antérieures, en lui accordant le droit d'exiger que le créancier poursuivant lui donne caution, avant de laisser, fera porter l'immeuble à si haut prix, que le détenteur sera payé intégralement de ses créances privilégiées ou antérieures. Art. 2073. C'est plus que la subrogation dont parle Fabvre, et mieux que le recours admis dans l'usage, tel que nous l'apprend Pothier. Il y a donc lieu de déclarer, que, dans la jurisprudence qui prévalait avant le code, dans nos usages, comme d'après le code qui déclare ces usages même, sont et ont toujours été notre loi et notre jurisprudence, la subrogation avait lieu par le seul effet de la loi, au profit de l'acquireur d'un immeuble qui paie au créancier auquel cet immeuble est hypothéqué. Maintenant, il faut examiner si l'acquéreur est, dans l'espèce, déchu de son droit de subrogation. Après avoir acquitté les hypothèques que lui avait dénoncées son vende ir, il a revendu l'héritage à Tétreau,

et c'est sur ce dernier qu'un créancier de l'auteur de l'acquéreur qui réclame la subrogation, a fait saisir et vendre le même héritage. Par cette éviction, Roy qui est cet acquéreur, perd le prix que lui devait Tétreau, ce prix représentant ce qu'il avait lui-même payé aux créanciers de son vendeur. La chose vendue est perdue pour lui, car prix, terre, c'est même chose; si le vendeur perd son prix, sans pouvoir reprendre sa terre, il perd sa terre, comme l'acheteur perd sa terre, s'il paie deux fois, ou sans utilité pour lui. Si Tétreau n'eût pas été évincé, Roy n'eût pas été, non plus, évincé de son prix. De fait, Roy est évincé de la chose qui lui avait été vendue. Quel est le principe de la subrogation? C'est de ne pas permettre à des créanciers de s'enrichir aux dépens d'autrui, par la libération d'une créance qui les aurait primés. Est-ce que les créanciers seront moins coupables du dol dont parle Pothier, s'ils attendent pour le commettre avec profit, que le mouvement de la propriété ait placé l'héritage dans les mains d'un autre? Est-ce qu'ils ne profiteront pas de la même manière du bien d'autrui pour s'enrichir? Si Lavallée se fut présenté à l'ordre sur une demande en ratification de titre de la part de Roy, sa créance eut été primée par celle d'Evé, qui était bailleur de fonds. Le droit de Lavallée lui permet de suivre son gage dans les mains des tiers détenteurs, et c'est dans l'exercice de ce droit de suite qu'il a fait vendre l'immeuble. Mais cette vente dépossède l'opposant de son gage. Tant qu'il n'est pis payé, la vente est imparfaite, et peut être résolue; quand elle est résolue, le vendeur reprend sa chose telle qu'il l'avait avant la vente. Si la résolution est l'effet de la loi, le vendeur est dans les mêmes conditions relativement à la chose vendue; l'éviction fait cesser la confusion des qualités de créancier hypothécaire ou privilégié et d'acquéreur de la chose affectée, si elle a lieu pour des causes indépendantes de l'acquéreur, et, alors, l'hypothèque ou le privilège reprend sa force, art. 2081, C. C. L'opposant est dans l'espèce, évincé de l'immeuble qu'il avait acheté et revendu, et, s'il est éconduit de l'ordre, il perdra son prix, qui aura été employé au profit et dans l'intérêt même de Lavallée. La subrogation qui a son principe dans les circonstances favorables du paiement, ne doit être refusée que lorsqu'elle se présente comme moyen de prendre ce qui n'est pas juste ou plus qu'il n'est dû, ou cause préjudice aux autres créanciers du vendeur. Si Roy n'eût pas fait opposition sur les deniers, Joseph Evé serait venu à l'ordre avant Lavallée, pour sa créance de bailleur de fonds. Lavallée n'eût pu s'écarter qu'en constatant son extinction par le paiement ou par la prescription. Elle n'est pas éteinte par la prescription, non plus que par le paiement; car par la subrogation qui s'est opérée quand Roy a payé Evé, les droits de

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ce dernier sont passés dans les mains de Roy. Ces droits ne pouvaient toutefois être exercés que dans l'éventualité prévue par la loi, viz: dans le cas où la chose pour laquelle tel paiement avait été fait serait soustraite du contrôle de celui qui faisait tel paiement. Il suffit, pour être dans la condition voulue, que la perte soit certaine, si la subrogation n'a pas son effet sur la chose vis-à-vis de laquelle elle doit être exercée. Un droit doit valoir et produire ses conséquences légitimes chaque fois qu'il y a danger et péril; autrement il serait sans valeur aucune. La vente judiciaire n'est que le moyen légal d'arriver à l'éviction qui donne ouverture à la subrogation et à ses effets. Il n'y a donc aucune raison de s'opposer à l'exercice d'un droit qui ne commence et n'a d'existence que par l'éviction même. Nous avons cherché à faire voir que l'éviction soit qu'elle se fasse sur l'acquéreur qui a employé son prix au paiement d'un créancier hypothécaire, ou sur un détenteur qui possédait pour avoir acheté de lui, est l'éviction de la chose à propos de laquelle la subrogation s'était opérée et sur laquelle elle devait s'exercer. Cela réglé, il ne s'agit plus que d'examiner si l'acquéreur perd la chose achetée. La vente judiciaire dépossède et termine l'éviction. Quel que soit l'acheteur, c'est pour lui nouvelle acquisition, second prix, qu'il doit acquitter, et si l'adjudicataire est le premier acquéreur qui a fait délais, il ne prend rien de son premier prix et de sa première acquisition. Tout cela est perdu pour lui par l'éviction. Il ne peut se faire aucune confusion de droits à raison de telle adjudication, A l'ordre il exercera ses droits sur le second prix comme tout créancier, et suivant les droits d'aucun créancier auquel il est subrogé par la convention ou par la loi. Ce n'est pas le même prix dont il s'agit, comme dans l'espèce Gauthier qu'on a citée, ce n'est pas non plus pour obtenir collocation une seconde fois, de la même créance comme on voulait le faire dans cette espèce. Les motifs qu'on trouve dans cet arrêt ne repoussent pas la subrogation. Elle est au contraire admise, mais on décidait qu'avant eu son effet utile une fois, on ne pouvait par plusieurs ventes réussir à réclamer utilement une créance déjà acquittée et éteinte par l'effet ordinaire, et l'exercice légal de la subrogation. Il faut même déduire des motifs et des faits, que si la subrogation n'eût pas été exercée sur le prix de Jean Pierre Gauthier, le premier acquéreur, elle eût pu l'être utilement dans l'espèce sur le prix du second acquéreur par la revente. L'opposant était bien fondé dans son opposition. La collocation de sa créance est conforme à ses droits et à la loi. Le jugement est comme suit: "La cour. considérant que l'opposant Roy a constaté qu'il a payé à Joseph Evé, auguel l'immeable saisi et vendu, dont il était

devenu acquéreur, par la vente du 7 mars 1861, était hypothéqué avec privilége du bailleur de fonds, par la vente du 26 août 1859, la somme de \$583.06 ainsi qu'il est allégué dans son opposition, et admis du reste par le contestant; considérant que la subrogation a eu lieu par le seul effet de la loi, et sans demande, au profit de l'opposant, à raison de tel paiement, et qu'il est en droit de l'exercer utilement sur le prix d'adjudication provenant de l'éviction du même immeu. ble contre lui ou contre celui auquel il l'a revendu, par lequel il perd l'immeuble et le gage qui assurait le prix qui lui était dû. Considérant que le paiement fait à Evé, par l'opposant, était dans l'intérêt des créanciers hypothécaires, et que Lavallée ne peut profiter de cette libération aux dépens de celui qui l'a effectuée par son paiement. Considérant que l'opposant Roy a juste droit à la collocation de la somme de \$425.14 faite on profit par le jugement de distribution, préparé pur le contaire, et que le contestant Lavallée n'a pas justifié sa concestation, maintient ladite collocation, et déboute Lavallée de sa contestation avec dépens." (17 J.,

CHAGNON et Signitude avocats de l'opposant Roy, colloqué. Bourgeois, Bachand et Richer, avocats du contestant

Lavallée.

ASSURANCE AU PROPIT DE LA FEMME.

COURT OF QUEEN'S BENCH, Montreal, 22nd June, 1874.

Coram Taschereau, J., Ramsay, J., Sanborn, J., Loranger, A. J.

CHARLES A. VILBON, As qualité, Petitioner in Court below, Appellant, and Rose-Delima Marsouin, Defendant in Court below, Respondent.

Held:—The provisions contained in the Act 29 Vict., c 17, whereby insurances upon the lives of husbands may be effected or indorsed in favor of their wives and children, are in the nature of dimens, and the insurance money due under policies made under said Act is free from the claims of the creditors of both the husband and wife.

The facts are as follows: On the 18th of June, 1873, upon the demand of one of her creditors, Rose-Delima Marsouin, marchande publique, was put into insolvency, under a writ of attachment, under the Insolvent Act of 1864, and amendments, and appellant, Charles Albert Vilbon, was appointed interim assignee. At the time of her husband's death, which

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took place shortly before the attachment, there was in force a policy of assurance upon his life, for \$1500, issued by "The New York Life Insurance Company," which had been effected conformably to the dispositions of the Act of the late Province of Canada, 29 Vic., chapter 17, for the exclusive benefit of his wife, the respondent. The appellant, by his petition, in the Insolvent Court, asked that the insolvent be ordered to hand over to him the said policy, as forming part of her insolvent estate, and being the gage of her creditors. insolvent contested the petition, invoking the above recited Act, and, particularly, its fifth section, as follows: "Upon "the death of the person whose life is insured, the insurance " money due upon the policy shall be payable according to "the terms of the policy or of the declaration as aforesaid, " as the case may be, free from the claims of any creditor or "creditors whomsoever." She alleged, therefore, that the amount due under the policy was her personal property, in the nature of alimens, and could not be subject to the claims of her creditors. The appellant, in answer, submitted the following: La seule question qui se présente dans l'espèce est une d'interprétation de l'acte ou statut plus haut mentionné. Comme on peut le voir, en y référant, c'est un statut fait pour protéger la femme contre les créanciers de son mari qui assure sa vie, et non une loi passée pour déclarer que les créanciers de la femme ne pourront pas saisir les argents que cette dernière pourrait avoir et qu'elle ne voudrait pas payer. Cette question fut plaidée et soumise à la Cour de Faillite, devant l'honorable M. le juge Beaudry, qui, le 21 octobre 1873, rendit le jugement suivant: "La Cour après avoir entendu C. A. "Vilbon et la dite R. D. Marsouin, sur la requête du dit C. A. "Vilbon, en sa qualité de syndic provisoire, et gardien sur le " bref en liquidation émané contre la défenderesse, examiné la " procédure et les admissions contenues dans les réponses de " la défenderesse; Considérant que la défenderesse admet " qu'elle est porteur d'une police d'assurance, au montant de "\$1,500, effectuée en son nom et pour son seul profit et avan-"tage, aux termes de l'acte du parlement de la ci-devant " province du Canada, 29 Victoria, ch. 17, sec. 5; Considérant " qu'il n'y a aucune preuve de la part du dit C. A. Vilbon, de "nature à molifier la dite admission, et à enlever à la dé-" fenderesse le bénéfice du susdit statut, renvoie la requête du " dit C. A. Vilbon, avec dépens."

RAMSAY, J. (dissenting):—The legislature has undertaken to break in upon an old principle of law, that the property of the debtor is the *gage* of his creditors. The Statute has made an exception of a peculiar kind. It is enacted that a person may make a life insurance upon his own life, paying

the premium while he lives, and, then, the insurance is to go to the person in whose favor it is made, and the creditor of the deceased cannot touch it. I do not question the power of the Legislature to do this. The question that arises here is the interpretation of a clause of the Act. It says that the insurance effected for the benefit of the wife shall be payable according to the terms of the policy, free from the claims of any creditor whatsoever. The majority of the Court think that this includes the creditors of the wife. I differ. I think the Act refers to the creditors of the husband, and that the creditors of the wife may claim the insurance, because the wife thus gets the benefit of it in having her debts paid. No one would pretend that, if the money was paid into a bank, to the credit of the widow, it could not be seized by her creditors. It is urged that this insurance must be treated as alimens. But it has none of the character of alimens: there is no limit to the amount of the insurance that may be effected.

LORANGER, A. J.—Le Statut 29 Vict., chap. 17, de la ci-devant province du Canada, art. 5, porte : "Lors du décès d'une personne dont la vie est assurée, le montant de l'assurance dû sur la police, sera payable aux termes de la police, ou de la déclaration comme susdit, selon le cas, et ne pourra être réclamé par aucun créancier ou créanciers que ce soit." Le mari de l'intimée, Mercier, avait fait assurer sa vie pour \$1,500 à une compagnie d'assurance (The New York Life Insurance Company), au profit de sa femme. Après sa mort, l'Intimée étant saisie de cette police, tomba en faillite. L'appelant, à qui avait été confiée la garde de ses biens, fit une requête devant la cour de Faillite, pour obtenir un ordre enjoignant à l'intimée de verser cette police dans la masse en faillite. Cette requête fut rejetée, et, sur l'appel, l'unique question qui se présente est de savoir si, en vertu de la loi ci-haut citée, la police d'assurance est insaisissable envers les créanciers de l'intimée, ou si cette insaisissabilité devait se limiter aux créanciers de son mari. La raison de décider, comme l'a fait le tribunal de première instance, en faveur de l'insaisissabilité, est que la loi dit en termes généraux, "que semblable police ne peut être réclamée par aucuns créanciers," sans faire de distinction entre les créanciers de celui qui a pris la police, et les créanciers de ses héritiers ou des personnes au profit desquelles a été effectuée la police. Quand la loi ne distingue pas, le juge ne doit pas le faire, et ici la créance, à cause de son origine et de son affectation, puisqu'elle a remplacé auprès de la famille d'un défunt les secours qu'elle recevrait de ses auteurs, et qu'elle est affectée aux aliments, doit être en droit l'objet d'un faveur spéciale. Il ne peut, à mon sens
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sens, y avoir de doute je ne dirai pas sur l'interprétation, mais sur l'application de cet article. Mais fût-il sujet à ce doute, que toutes les règles de droit se réunissent pour le faire pencher du côté de l'intimée. Les jurisconsultes proclament à l'envi la solution des questions douteuses au profit des causes favorables. Semper in dubio benignioria proxferenda sunt. In re dubid benigniorem interpretatinem sequi non minus justitius est quam tutius. Rapienda occasio est, que prebet beniquius responsum, disent les jurisconsultes romains dont les opinions sont rapportées au titre des règles de droit. Il ne faut pas oublier que la cause des femmes est favorable, et que c'est ici une mère de famille dans l'indigence dont la police que veulent lui arracher ses créanciers est le dernier moyen de subsistance, et qu'en la lui laissant on porte une décision fondée non seulement sur l'humanité, mais sur le droit même. Confirmons donc un jugement rendu avec tant de justice.

Sanborn, J.: The insurance was effected by her late husband under the Prov. Stat. 29 Vic., c. 17, for her benefit. It is claimed on her part that under said Act such insurances were in the nature of alimentary allowances and not susceptible of seizure. The terms of the Act admit of two constructions—Section 5, "Upon the death of the person whose life is insured, the insurance money due upon the policy, shall be payable free from the claims of any creditor or creditors whomsoever." This may be understood to mean any class of creditors of the deceased or any creditors of either husband or wife. I think the wife's pretensions are well founded. The evident intention of the Act was to secure something in the nature of sustenance for wife or children as the case might be, and it would be thwarted if creditors could take it from her or them, It is also to be remarked that the premiums paid upon the policy have been paid out of the husband's estate not the wife's, and it may be likened to a special legacy made by the husband conditioned upon its being appropriated for the benefit of the wife for her support and not liable to seizure by her creditors. The terms of the subsequent Act of the Province of Quebec, 33 Vic., c. 21, favor this view, as the provisions of this last Act indicate that the insurance is to be appropriated for alimentary allowance for children, and tutors of minors are empowered to expend the accruing interest for such purpose. Alimentary allowances are insaisissables, Vide Dalloz, Dic. Mot " Alimens."

La cour d'Appel a confirmé le jugement rendu par la Cour Supérieure siègeante à Montréal, le 21 oct. 1873 (The honorable Mr Justice Ramsay dissenting.) (17 J., p. 270 et 18 J., p. 249.)

ARCHAMBAULT DE SALABERRY, for appellant.
DORION, DORION & GEOFFRION, for respondent.
TOME XXIII.

PROCEDURE .- PLEADINGS.

COURT OF QUEEN'S BENCH, Montreal, 20th December, 1872.

COTAM DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

GADBOIS, Appellant, and TRUDEAU et al., Respondents.

Held:—That a plaintiff has no right to fyle, even by permission of the Court, supplementary or additional reasons in support of his demand, when they are based on new facts arisen since the action was brought.

RAINVILLE, for appellant: L'appelant se plaint d'un jugement interlocutoire, rendu par la Cour Supérieure siégeant à Montréal, 30 octobre 1869: M. le juge TORRANCE, présidant. Voici ce jugement: "The Court, having heard the parties, " upon the motion of plaintiffs of the 27th October instant, to " be permitted to produce and fyle certain moyens supplé-" mentaires et additionnels annexed to the motion, doth grant "the motion, and doth permit to plaintiffs to fyle the said " moyens supplémentaires et additionnels, reserving to ad-" judge hereafter upon the costs, and doth grant to defendant "a delay of eight days to plead in answer to said moyens " supplémentaires et additionnels." Par son testament, Joseph Beaudry nomma l'appelant, conjointement avec J. L. Beaudry, et Jean-Baptiste Beaudry, ses exécuteurs testamentaires. Après son décès, son épouse, Marie-Anne Trudeau, fut nommée tutrice à ses enfants mineurs. C'est en cette qualité qu'elle institua contre l'appelant, conjointement avec Jean-Louis et Jean-Baptiste Beaudry, une action en destitution d'exécution testamentaire. Cette action est basée principalement sur le fait que l'appelant avait des intérêts opposés à ceux de la succession, et qu'il s'était conduit de manière à entraver la gestion et administration des autres exécuteurs. L'appelant plaida à cette action, le 18 février 1869; les intimés ne répondirent pas, et la procédure en resta là jusqu'au 23 octobre suivant. Le 23 octobre, l'appelant reçut un avis de motion: par cette motion, les intimés demandaient la permission de produire et ajouter à leur demande, des moyens supplémentaires additionnels vu que, depuis l'institution de leur action, il était survenu des faits nouveaux. Ces faits nouveaux, ainsi qu'allégué, étaient que l'appelant avait établi avec Lafricain, un magasin dans le même genre que celui de la ci-devant société Joseph Beaudry & Cie, dont ils étaient les seuls membres survivants, et qu'ils avaient pris le titre de successeurs de "Jos. Beaudry & Cie," et en outre, que l'ap-

pelant lagaelle L'appel moyens rien ajo et non e rieurs à n'avait intimés, mentair sion de c deux mo dente, so ou indiq auteurs. dans la c pas, et ils dans celle admissible et non por les intimés ils doivent ne sont pa moyens no en feront l jugée dans les juges D et rapporté défendeu. la Cour défenses 1 de la Cou pas ainsi changer se refaire sa n'existaier done pas l motion, l'e déclaration qu'elle fut jugement a réformation

⁽l) Un amend Pistérieur à l'a 1856, DAY, J., & P. 398)

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pelant avait eu une querelle avec J. L. Beaudry, pendant la relle ils étaient venus sur le point d'en venir aux mains. L'appelant s'opposa à l'introduction dans la procédure de ces moyens additionnels, sur le principe qu'un demandeur ne peut rien ajouter à sa demande, si ce n'est par demande incidente. et non ajouter des moyens nouveaux basés sur des faits postérieurs à l'action pour étayer et peut être établir un droit qu'il n'avait pas. La Cour Supérieure a accordé la motion des intimés, et leur a permis de produire leurs moyens supplémentaires. C'est ce jugement que l'appelant soumet à la révision de ce tribunal. L'appelant ne connaît jusqu'à présent que deux moyens de changer une action : soit par demande incidente, soit par amendement. Il n'y a pas d'autre moyen connu ou indiqué par le Code de procédure, non plus que par les auteurs. Les intimés ne peuvent ranger leur procédure que dans la catégorie des demandes incidentes; ils ne prétendent pas, et ils ne sauraiant le faire, que leurs moyens tombent dans celle des amendements. Or une demande incidente n'est admissible que pour demander un droit échu depuis l'instance. et non pour étayer ou établir un droit que l'on réclamait; si les intimés avaient un droit lors de l'institution de leur action. ils doivent rester avec leurs premiers moyens, et si ces moyens ne sont pas suffisants, leur action doit être déboutée. Si les moyens nouveaux qu'ils invoquent leur donnent un droit, ils en feront le sujet d'une action nouvelle. Cette question a été jugée dans le sens de l'appelant, par un jugement rendu par les juges Day, Smith et Mondelet, re Marsolais vs Lesage, et rapporté au L. C. J., vol. 1 (1), p. 42. " Per Curiam: "Le défendeur avait bien le droit de plaider un fait nouveau. et la Cour en lui accordant la permission de fournir des défenses nouvelles, n'a fait que suivre la pratique invariable de la Cour, et qui est fondée en principe. Mais il n'en est pas ainsi par rapport au demandeur. Il n'a aucun droit de changer son droit d'action ou de le dénaturer. Il ne peut pas refaire sa demande, et alléguer des faits nouveaux qui n'existaient pas lors de son introduction, et qui ne pouvaient done pas lui donner un droit d'action. Si l'on accordait cette motion, l'on permettrait au demandeur de faire, dans sa déclaration, l'allégation d'un fait qui n'existait pas lorsqu'elle fut datée et signifiée." L'appelant soumet donc que e jugement de la Cour Inférieure, est erroné et en demande a réformation.

⁽¹⁾ Un amendement ne peut être fait à la déclaration pour alléguer un fait pstérieur à l'action. (*Marsolais vs Lesaye*, C. S., Montréal, 30 décembre 1856, DAY, J., SMITH, J., et MONDELET, J., 1 J., p. 42, et 5 R. J. R. Q., p. 398)

Roy, Q. C., for respondents: L'action était dirigée, en Cour Inférieure, contre l'appelant, en destitution d'exécution testamentaire, sous les circonstances suivantes: Par son testament passé devant Belle et confrère, notaires, le 26 janvier 1866. et par codicille rédigé devant les mêmes notaires, le 12 juillet 1868, Joseph Beaudry nomma, comme ses exécuteurs testamentaires, Jean Louis Beaudry, Jean Baptiste Beaudry et Olivier Gadbois, de la cité de Montréal; ce dernier est l'appelant. Au décès de Joseph Beaudry, survenu le 13 juillet 1868, les exécuteurs testamentaires entreprirent l'administration des affaires de la succession; mais l'appelant ayant formé le dessein d'acquérir à vil prix, la part échue à la succession dans les affaires de la ci-devant société "Joseph Beaudry et Cie," et, voyant qu'il ne pouvait réussir à faire accepter ses propositions à ses co-exécuteurs, il fit fermer le magasin de la ci-devant société, au grand préjudice de la succession, et prenant, dès lors, une attitude hostile vis-à-vis de ses co-exécuteurs, il refusa systématiquement de leur donner aucune information sur les affaires de la société, et les menaça même plusieurs fois d'actes de violence, dans l'espoir sans doute qu'ils préfèreraient résigner leur charge, plutôt que de se soumettre à ses injures. Après l'institution de cette action, l'appelant, confiant dans la doctrine qu'il va soutenir devant ce tribunal, que les intimés ne peuvent porter à la connaissance de la cour ce qui peut s'être passé depuis et en violation flagrante des devoirs de sa charge, lança dans le public, et auprès des chalands de la maison Beaudry, une circulaire, où il s'annonçait faussement comme successeur de ladite maison, tandis qu'au contraire le commerce de cette maison était continué par les autres exécuteurs. Cette manœuvre eut nécessairement pour effet de tromper plusieurs personnes, et de causer du dommage à la maison Beaudry. De plus, l'appelant se porta à de tels actes de violence, vis-à-vis de celui de ses co-exécuteurs, qui administraient plus activement les affaires de la succession, et aussi vis-à-vis des commis de cette succession, qu'il fallut le menacer de la police pour le calmer et le rappeler à la raison. Les intimés s'adressèrent à la Cour Supérieure, pour obtenir la permission d'invoquer ces nouveaux moyens, et donner ainsi plus de force à leurs prétentions; ces moyens furent énoncés d'une manière précise et circonstanciée, et la cour obtempéra à cette demande. L'appelant soumet respectueusement que ce jugement est bien fondé. Il ne s'agit, en effet, que d'une question de procédure, et pareilles matières sont laissées, dans la pratique, à la discrétion de la cour; les amendements (et les moyens supplémentaires en l'espèce tombent dans la catégorie des amendements) sont permis en

tout éta la natu proc. Baprès l' conclus avaient Lappele aint? aé pour réservés atteintes allégatio s'ils dén de l'app violence d'un exé qui peut The fo considéra une actie dans les cédure C

ion; connels nouveaux par les ar le jugeme rendu par tième jou casse et jugement cette cour més), le v duire les ravec déperenchef Dep. 52)

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tout état de cause, pourvu toutefois qu'ils ne changent point la nature de la demande. Rodier, quest. sur l'ord. p. 17; Code proc. B. C., art. 53. Ici, la demande restait si bien la même, après l'introduction de ces moyens supplementaires, que les conclusions n'étaient nullement modifiées. Les nouveaux faits avaient le même caractère que ceux libellés dans la demande. L'appelant se trouve-t-il lésé par le jugement dont il se aint? Certainement non; un délai raisonnable lui est accorde pour fournir réponses à ces moyens, les dépens sont réservés; ainsi les fins de la justice seront plus sûrement atteintes: si les intimés ne peuvent prouver amplement leurs allégations ils seront renvoyés de leur demande, tandis que s'ils démontrent l'existence des manœuvres et des violences de l'appelant et la continuation de ces manœuvres et de ces violences depuis l'institution de l'action, ils se débarrasseront d'un exécuteur testamentaire qui a méconnu ses devoirs et qui peut compromettre l'avenir de la succession.

The following was the judgment of the Court: "La cour, considérant que, bien qu'il soit permis au demandeur, dans une action, de produire une demande incidente supplétoire, dans les cas prévus par les articles 18 et 149 du Code de Procédure Civile, il ne lui est pas permis, par la loi, de faire une demande supplétoire ou additionnelle, fondée sur des faits ouveaux qui n'existaient pas lors de l'introduction de son

ion; considérant que les moyens supplétoires et addinonnels produits en cette cause sont fondés sur des faits
nouveaux, et n'entrent pas dans la catégorie des cas prévus
par les articles ci-dessus cités; considérant, partant, que, dans
le jugement dont est appel, savoir, le jugement interlocutoire
rendu par la Cour Supérieure siégeant à Montréal, le trentième jour d'octobre 1869, il y a erreur; cette cour infirme,
casse et annule ledit jugement, et, procédant à prononcer le
jugement que la cour de première instance eut dû rendre,
cette cour rejette la motion faite par les demandeurs (intimés), le vingt-sixième jour d'octobre 1869, demandant à produire les moyens supplémentaires et additionnels y annexés,
avec dépens dans les deux cours. Dissentientibus, M. le juge
en chef Duval, et M. le juge Caron. (17 J., p. 271; 3 R. C.,
p. 52)

DUHAMEL et RAINVILLE, for appellant. ROUER ROY, Q. C., for respondent.

CONTRAINTE PAR CORPS.-PROCEDURE.

SUPERIOR COURT, Montreal, 26th May, 1873.

Coram Johnson, J.

HIGGINS VS BELL.

Held:—That an application for contrainte par corps cannot be granted on a simple motion although notice has been served, there must be a rule.

This was a motion for contrainte par corps against the prothonotary and the plaintiff's attorneys to compel produc-

tion of a paper.

PER CURIAM: It is impossible to grant the present application. The proper procedure is by rule of Court, calling on the parties to show cause. Here a simple motion for contrainte has been made, and, although notice of the motion has been duly served, the Court cannot deviate from the actual requirements of the law, which exact that a rule of Court shall issue. The defendant should have moved for a rule and not for the contrainte itself. Take nothing by motion. (17 J., p. 274)

Kelly and Dorion, for plaintiff.

JUDAH and WURTELE, for defendant.

INSURANCE AGAINST FIRE.

COURT OF QUEEN'S BENCH, Montreal, 20th December, 1872.

Coram Duv. 7, Ch. J., Caron, J., Drummond, J., Badgley, J., Monk, J.

OLIVER W. STANTON, Plaintiff in the Court below, Appellant, and THE ÆTNA INSURANCE COMPANY, Defendant in the Court below, Respondent.

Held:—That a fire policy, in favor of appellant, on coal oil, "his own, in trust, or on consignment," covered his loss on oil destroyed by fire in Middleton's sheds, warehouse receipts for which, granted by Middleton in favor of Thomas Ruston, had been transferred by Ruston to appellant, and on which receipts appellant had made advances to Ruston, who obtained such advances really for Middleton, without appellant, however, being aware of the fact.

This was an appeal from a judgment of the Superior Court, at Montreal, setting aside a verdict rendered by a jury upon the issues as settled by the judge, and granting a new trial

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And also rejecting the motion of appellant for judgment upon the said verdict. The action was instituted by appellant in the Court below, upon a policy of insurance issued by defendants on the 5th day of June, 1867. The declaration alleged that, on the 20th May, 1867, Thomas Ruston, broker, or some person or persons unknown to appellant, acting by Thomas Ruston, broker, owned and possessed 180 barrels of 40 gallons each of refined coal oil, of the brand known as the Atlantic brand, then in warehouse of William Middleton & Co., at Montreal, known as store no 1, and that the said warehousemen, then and there, made and gave to Ruston a warehouse receipt for the same; that, on the 27th of May, Ruston, or some person acting by him, as broker, also owned and possessed 120 barrels of 40 gallons each of coal oil, of the brand known as the Improved Illuminator Brand. which were also in the warehouse of Middleton & Co., and for which also, on the last mentioned day, the said warehousemen gave Ruston a werehouse receipt. The warehouse receipts are as follows: "Monty 22, 20th of May, 1867. Received into store, on account of Thomas Ruston, and deliverable only on production of this receipt duly endorsed by him, one hundred and twenty barrels refined coal oil, "Improved Illuminator Brand," average quantity guaranteed forty gallons per barrel. Insured by owner. Stored in n° 1 store. (Signed)—W. MID-DLETON & Co." " MONTREAL, 27th May, 1867. Received into store, on account of Thomas Ruston, and deliverable only on production of this receipt, duly endorsed by him, one hundred and eighty barrels refined coal oil, Atlantic Brand, average quantity guaranted forty gallons per barrel. Insured by owner, stored in store no 1. (Signed,)—W. MIDDLETON & Co." The declaration proceeds to allege that, by virtue of these warehouse receipts, Ruston came to have the entire control and power of disposal over the said oil, as the owner thereof, or, as regards appellant, to the same extent as if he had been the owner thereof; that, on the 4th of June, 1867, Ruston assigned and transferred, to plaintiff and appellant the 300 barrels of refined coal oil, then still in the warehouse, by endorsing and delivering to appellant the two warehouse receipts already referred to, as security for Ruston's promissory note for \$1,800, due on the 7th of October, 1867, payable to the order of appellant; appellant agreeing that, on payment of such note, he would reconvey and return the oil to Ruston; that the condition of payment was not fulfilled, that plaintiff was still the holder of the warehouse receipts, and, by virtue thereof, was the owner and possessor of the said oil; that, on the 5th June, defendants and respondents issued a policy of insurance in favor of appellant, in consideration

of forty dollars premium, in which they agreed to insure appellant against fire, for one year from that date, to the extent of \$2,000, on "refined coal oil, his own, on trust, or on "consignment, contained in a vault covered with earth " situated on the north side of the Grand Trunk Railway, at " Point St. Charles, near Montreal, C. E., isolated;" which vault appellant alleged was the same place indicated in the warehouse receipts, as store no 1 of Middleton & Co.; that, on the morning of the 18th day of August, 1867, while the policy was in force, the vault or store no 1 was burned, and the oil totally destroyed, the oil then being of the cash value of \$2,400; and that appellant, thereby, suffered damage to the extent of \$1,800, being the amount of his claim upon Ruston, on the promissory note already mentioned. The declaration then proceeded to set forth the conditions of the policy, as to giving notice of the fire, and as to giving a particular account of the loss and damage, supported by affidavit, &c., the whole of which conditions appellant alleged he had performed; That appellant suffered damage, by the fire, to the extent of the said sum of \$1,800, being the amount of his interest in the said coal oil; and that respondents became bound and obliged to indemnify him to that extent, which they had failed to do. And, in support of this declaration, appellant produced the warehouse receipts, Ruston's note for \$1,800, his acknowledgment of the pledge of the 300 barrels of oil, and the policy. The respondents filed several pleas to appellant's action, namely; 1st. That appellant was not the owner or proprietor of the oil, either in trust or otherwise, as represented by him to respondents at the time he effected the insurance; and that no risk ever attached under the said insurance, inasmuch as there never was, and there was not, at the time of the fire, any oil whatever in the vault, or store referred to in the declaration, the property of plaintiff, or any in trust or on commission; That, moreover, appellant never acquired any right or title to the oil mentioned in his declaration, under the transfer of the warehouse receipts; inasmuch as Ruston did not own or possess, either in his own right, or as acting for any other person, the oil mentioned in the warehouse receipts; that, in fact, Ruston, neither as owner nor as broker, had ever placed in store with Middleton & Co., the oil mentioned in the warehouse receipts, as they falsely represented; and that neither Middleton & Co., nor Ruston, ever owned or possessed the whole or any part thereof; that William Middleton, carrying on business under the name of William Middleton & Co. made the warehouse receipts, fasely representing Ruston to have the oil in his sheds, for the purpose of obtaining advances thereon for his

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(Middleton's) benefit; whereas, neither Ruston, nor Middleton had any such oil in the premises at the time; that the warehouse receipts had been fraudulently issued and delevered to Ruston for the aforesaid purpose; that appellant obtained them from Ruston, with a full knowledge of the facts, and, especially, that Ruston was negotiating the warehouse receipts as agent and broker of Middleton; and also with the knowledge that the oil was not actually in store in any of the sheds of Middleton; that it was agreed, by a condition of the policy, that respondents should not be held liable, if there should be any other or prior insurance upon the property insured, without the written consent of respondents; and that there were other insurances upon the coal oil represented by the warehouse receipts, which had not been notified to respondents. Appellant, having declared his option of a trial by jury, suggestions were submitted by both parties, and the Court adjusted the questions to be submitted to the jury, as follows, to which questions are added the findings of the jury, at the trial before Mr Justice TORRANCE, on the 9, 10, 11 and 12th days of March, 1869; "1st. Were defendants, on the fifth day of June, 1867, a body corporate in the State of Connecticut, one of the United States of America, with the power to carry on the business of fire insurance, and were they carrying on the business of fire insurance, at the city of Montreal, at the said date?" Answer. "Yes." 2nd." Was Thomas Ruston, of the city of Montreal, broker, mentioned in the declaration, on the 20th day of May, 1867, date of receipt, plaintiff's exhibit no 1, owner of 180 barrels of refined oil of the brand known as "Atlantic Brand," mentioned in said receipt. If not the owner, was he the holder of said oil, and for whom; and what was his interest therein?" Answer. "Ruston was the holder of the oil, for the purpose of obtaining advances thereon, in his capacity of broker, for Wm Middleton." 3rd. "Did Ruston, on the 20th day of May, 1867, actually place in store with Middleton the quantity of oil last mentioned, as owner thereof, as the receipt purports to certify, or as representing some other person, and state who?" Answer. "No, the oil being previously in said store." 4th. "Was the oil referred to in the above-mentioned receipt, actually in store at the date of said receipt, and, if so, in which of the sheds of Middleton was it stored?" Answer. "The oil was in store, at said date, in shed no 1." 5th. "Was Ruston, on the 27th day of May, 1867, the owner of a further quantity of 120 barrels of refined coal oil, of the brand known as "Improved Illuminator" brand, mentioned in the receipt, plaintiff's exhibit, no 2? If not was he the holder of said oil, and for whom, and what was his interest therein?" Answer. "Ruston was the holder of the said oil, for the purpose of obtaining advances thereon, in his capacity of broker, for Middleton." 6th. "Did Ruston, on the said 27th day of May, 1867, date of said receipt, plaintiff's exhibit no° 2, actually place in store with Middleton the quantity of oil mentioned, as the owner thereof, as the said receipt purports to certify, or as representing some other person, and state whom?" Answer. "No, the said oil being previously in said store." 7th. "Was the oil referred to in the abovementioned receipt accually in store at the date of said receipt, and, if so, in which of the sheds of Middleton was it stored?' Answer. "The said oil was in store, at said date, in shed nº 1." 8th. "Did Middleton sign and deliver to Ruston, on the 20th and 27th days of May, 1867, the receipts, plaintiff's exhibits nos 1 and 2?" Answer. "Yes." 9th. "Were such receipts so made and delivered by Middleton to Ruston, for the purpose of enabling him to obtain advances thereon, for the benefit of Middleton?" Andwer. "Yes" 10th. "Did Ruston transfer said receipts to plaintiff, as security for an advance thereon, and, if so, when and for whose benefit?" Answer. "Yes, he did transfer said receipts to plaintiff, on 4th June, 1867, for advances made thereon for the benefit of Middleton." 11th. "What was the amount of said advance?" Answer. "\$1,800." 12th. "Was plaintiff aware when he made said advances, in what capacity and for whom Ruston was then acting; and if so, in what capacity and for whom did he believe him to be so acting?" Answer. "We have no evidence to show that plaintiff was aware when he made the advance in what capacity and for whom Ruston was acting." 13th. "Did Middleton, in the month of May, 1867, issue and deliver to Ruston, warehouse receipts, in his favor, for coal oil, without having in store the oil mentioned in such receipts, for the purpose of obtaining advances thereon, and were the plaintiff's exhibits numbers one and two, of the number of such receipts so issued?" Answer. "He did issue and deliver said receipts, and the said oil was in store at that time." 14th. "Did plaintiff effect an insurance with defendants, on or about the fifth day of June, 1867, on the oil mentioned in the receipts, plaintiff's exhibits Nos. 1 and 2, and according to the purport of the policy of insurance, plaintiff's exhibit N° 5, and subject to the conditions thereon endorsed, and did defendants, thereupon, issue and deliver the policy to him?" Answer. "Yes." 15th. "Did plaintiff effect the said insurance as the owner of the oil mentioned in the policy? And, if not, in what manner did he effect the same?" Answer. "He effected said insurance in the usual way, to secure the advance made by him on said oil." 16th.

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"Had plaintiff any and what interest in the oil at the time of effecting said insurance?" Answer. "He was interested in said oil, to the amount of \$1800, being his advance thereon." 17th. "Were defendants through their agents, or otherwise, made aware at the time of said insurance, of the nature of the interest which plaintiff had in the coal oil mentioned in the policy; if so, state in what manner they acquired such information and in what did it consist?" Answer. "The policy of insurance issued by defendants leads us to infer that they had been made aware of the nature of the transaction." 18th. "Had any other, and, if so, what insurance been effected upon the oil, or any part thereof, either by plaintiff or any person on his behalf, prior to said insurance thereof by defendants, and, if so, did plaintiff make known such prior insurance to defendants, and cause the same to be entered on the policy?" Answer. "We have no evidence to show that any other insurance had been effected on said oil." 19th. "Was the coal oil shed of Middleton, known as shed number one, destroyed by fire on or about the 18th day August, 1867?" Answer. "Yes." 20th. "Was the quantity of oil mentioned in the receipts, plaintiff's exhibits numbers one and two, or any part thereof, in shed number one at the time of the fire, and was the same destroyed by the fire?" Answer. "Yes; the said oil was in shed number one, and was destroyed by said fire." 21st. "Did plaintiff sustain any loss, by the destruction, by fire, of the coal oil mentioned in plaintiff's exhibits numbers one and two, or any part thereof, and, if so, state at what sum you estimate such loss?" Answer. "He sustained the loss of his advance of eighteen hundred dollars." After this verdict was rendered, respondents, moved that the verdict and findings of the jury be set aside, as being contrary to the evidence adduced, and contrary to law, and that judgment be rendered in favor of respondents, and the action dismisse t, with costs; and also moved that, in the event of the Court not granting the said motion, the verdict and findings of the jury be set aside and rejected, and a new trial granted. Thereupon, appellant moved for judgment upon the verdict. The first and last of these three motions were dismissed by the Court, but the motion made by defendants, for a new trial, was granted. And the appeal was from that judgment. This motion was supported by nineteen reasons, which may be condensed into seven, as follows: 1st. Because plaintiff failed to establish in evidence that Ruston ever was the holder or owner of the oil, in which proposition was embodied the following: that the evidence of the ownership was conflicting; that there was no evidence that the warehouse receipt was made out and delivered to Ruston with the authority of the owner of the oil; that the warehouse receipts were null and void, because they declared that the goods were placed by Ruston in Middleton's possession, which was false; that there was no oil in the shed no 1 of the description mentioned in the warehouse receipts, the property of either Middleton or Ruston; that Middleton, a warehouseman, could not sell or pledge oil the property of other parties stored in his warehouse; 2nd. Because plaintiff failed to establish the value of the oil: 3rd. Because the evidence showed that, both prior and subsequent, insurances had been effected upon a large quantity of oil, of which the oil mentioned in plaintiff's declaration formed a part, which insurance was not endorsed on the policy sued upon. But that the judge erroneously charged the jury that there was none; 4th. Because the judge erroneously charged the jury that the warehouse receipts were valid, without Middleton's endorsement; 5th. Because the judge erroneously charged the jury that Middleton could validly sell or pledge the oil of other parties, which he had in his warehouse, without the authority of his principals; 6th. Because the judge erroneously charged the jury that, if there was evidence that the oil was in the warehouse at the date of the receipts, the presumption was that it was there at the time of the fire. Lastly, because the judge erroneously charged the jury that the evidence of Ruston was to be considered, and that of Middleton disregarded, instead of holding that, in consequence of their evidence being conflicting, plaintiff had failed to establish

The following was the judgment of the Court of Appeal: "The Court, considering that it is established, in evidence, that the oil, the subject of this contention, insured by the policy of insurance issued therefor by respondents, in favor of appellant, was destroyed by the fire which occurred in the oil shed in which it was stored at the time of the occurrence of the fire, and that appellant had an insurable interest in the oil at the time of its destruction to the amount of \$1800; considering that, at the trial of the issues in this cause; by a special jury, a verdict was found in favor of appellant, and that, in the judgment rendered by the Superior Court, at Montreal, on the twenty-first day of May, 1869, whereby the verdict and findings of the jury were set aside, and a new trial was granted upon the motion of respondents, there is error, doth set aside the said judgment, and, proceeding to render such judgment as the Superior Court should have rendered, doth set aside and reject the motion of respondents for a new trial upon the said issues, and doth maintain the verd of ap findi He

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have dents the verdict and findings of the jury, and doth grant the motion of appellant for judgment in his favor, upon the verdict and findings aforesaid." (17 J., p. 281)

HON. J. C. C. ABBOTT, Q. C., for appellant. Carter & Hatton, for respondent.

ENOUETE.-EXAMINATION OF WITNESSES.

SUPERIOR COURT, Montreal, 31st March, 1873.

Coram MACKAY, J.

PAYETTE vs COUSINEAU.

Held: That the testimony of a witness in sur-rebuttel may be attacked by counter evidence to show that such witness was inimical to plaintiff, and was not to be believed under oath.

PER CURIAM: The plaintiff desires te examine witnesses to show that a witness examined in sur-rebuttal was actuated by spite, in giving his testimony. It is irregular to produce evidence after sur-rebuttal, but this is an exceptional case, and the motion is granted. The evidence however, must be restricted to prove *inimitié* alleged of Rocheleau, the witness, and that he is not to be believed under oath. Plaintiff's motion granted. (17 J., p. 287)

MOREAU, OUIMET & ST-PIERRE, for plaintiff.

EMERY ROBIDOUX, for defendant.

RESPONSIBILITY OF OFFICERS IN THE ARMY.

SUPERIOR COURT, Montreal, 17 December, 1872.

Coram MACKAY, J.

BARNES vs MOSTYN.

Held: 1. That the Gommanding Officer of a British Regiment, who is sued by a retired corporal of the Regiment for damages, alleged to have been caused by his arrest and imprisonment by the Colonel, whilst in the Regiment, illegally, maliciously, and without probable cause, cannot invoke the want of one month's notice of action, provided for in Article 22 of the Code of Civil Procedure, even when it is proved that he acted, in reality, legally, without malice, and with reasonable or probable cause.

2. That, under the facts proved, the defendant was fully justified in all that he did with regard to the plaintiff, and that he acted legally, without malice, and with reasonable or probable cause.

MACKAY, J.: This suit was instituted about five years ago, for \$10,000 damages, for illegal imprisonment of plaintiff, by defendant. The plaintiff was an enlisted soldier in the 23rd Regiment, and master shoemaker to the Regiment. Defendant commanded the Regiment, at dates mentioned in plaintiff's declaration, but had to govern according to the Queen's regulations and orders for the Army, and to the Mutiny Act. On the 18th May, 1867, at Montreal, plaintiff was sent for, and attending in the Orderly Room, was questioned by (among others) defendant respecting boots made by plaintiff in 1865, there having been discovered an alleged deficiency (says plaintiff's declaration) three months before that; deficiency of 60 pairs of boots in the Quarter-Master's store, but of which plaintiff was ignorant, and for which he was not responsible; that that day, 18th May, plaintiff was placed under arrest, by defendant's order, and, forthwith, plaintiff's private property and tools were taken possession of by defendant. Twelve nights and twelve days, plaintiff was so kept in arrest and close confinement, and could only be set at liberty by order of defendant; that no charge was made known to plaintiff, nor did defendant appoint plaintiff to be tried or to be heard, at any time during the said twelve days, contrary to the Articles of War; that, on 22nd of May, plaintiff was in confinement, and the half-yearly inspection of the regiment was made by General Russell, and, at that inspection, all prisoners were brought before General Russell, to make any complaint, but plaintiff was deprived of that privilege, contrary to the orders for the army, as defeadant well knew; that, on 30th May, defendant ordered plaintiff to be brought before him, and, without any charge being brought against plaintiff, and, in the absence of the officer commanding plaintiff's company, severely censured plaintiff, deprived him of his place of master shocemaker, and ordered him to be disgraced, and sent back to the ranks, contrary to the orders for the army; that, subsequently, plaintiff was three times arrested upon various pretences, in connection with said deficiency of 60 pairs of boots, 9th and 10th June, at Montreal, and 11th July, at Point Levis, and, each time, was discharged after hours of imprisonment, without anything wrong being proved against plaintiff. During all these imprisonments, plaintiff was kept out of possession of his property and personal effects, which were held by defendant; and tools and boots were taken out of plaintiff's boxes, to his

great Genera warded of the done n cause, and for obliged been dr the righ abstract unable t and me \$10,000 Capias i action: guilty. not cons on the the case the meri confined it; the 9 Levis, be seems to boots in t for maki ciency of Montreal. it, plainti made 31 Quarter-M was his re aroused so an accoun embezzied confineme not confin any false any false stores, or v the public was intend Commandi the maint regiments. custom of in lly, go, by 3rdeninen's Act. for, by tiff ney lefibut not ced iff's de-3 SO t at nade o be ays, lay, n of insi, to that ant f to ing icer tiff, red to to vas ion ine, me, nyese

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great loss; three letters of grievances written by plaintiff for General Russell, and which defendant ought to have forwarded, defendant refused to forward, contrarily to the rules of the army, etc. All complained of acts of defendant were done maliciously and without just, reasonable, or probable cause, and without observance of the formalities required. and for the object of ruining plaintiff. Plaintiff has been obliged to spend over \$40 for legal advice; that plaintiff has been driven to take his discharge, and has, by doing so, lost the right to pension and a medal; plaintiff has lost property abstracted during his imprisonment, and which he has been unable to recover, and so has been injured in his trade \$200. and mentally and otherwise, and in his character has lost \$10,000 value of damages; conclusion accordingly for \$10,000. Capias allowed for \$2,000. The pleas are: 1st, no notice of action: this is demurred to. 2nd, general denial, and not guilty. Now, as to the demurrer, I must maintain it, as I do not consider the article of the Code invoked, which is based on the Cons. Stat. of L. C., ch. 101, secs. 1 and 2, applies to the case of the Commanding Officer of a Regiment. Then, on the merits, I may say, that the evidence is almost entirely confined to the arrest of May, 1867, and to what passed upon it; the 9th and 10th June ones, and that of July, at Point Levis, being not much gone into. As to the arrest in May, it seems to have arisen out of a discovery of a deficiency of boots in the stores of the regiment. Plaintiff had been paid for making 78 pairs 1st April, 1866, at Gibraltar. A deficiency of some 46 pairs at least was plain to be seen at Montreal, February, 1867, and Lieut. Liddell inquiring about it, plaintiff stated to him that, to the best of his belief, he had made 31 or 32 pairs. Liddell, at this time, was Acting This statement by plaintiff, while there Quarter-Master. was his receipt of 1st April, 1866, for the money of 78 pairs, aroused some suspicions. Had there been money taken upon an account presented that was false? Had there been boots embezzled? This arrest, says plaintiff's declaration, was close confinement. It was really only confinement to barrack room, not confinement to guard room. Any soldier who shall give in any false statement of clothing, stores, &c., or who shall, by any false document be concerned in any embezzlement of stores, or who shall, by producing any false accounts, misapply the public money for purposes other than those for which it was intended, is liable to punishment under Art. of War, 88. Commanding officers are responsible, among other things, for the maintenance of a proper system of economy in their regiments. P. 31, Pipon's Manual of Military Law. The custom of the service has established the right of every

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officer in command of troops to assemble, at his will, courts of inquiry for the investigation of any matter connected with the service, on which he may feel a difficulty, from imperfect information or otherwise, in arriving at a conclusion. P. 170, Pipon. The Exchequer Chamber has recognized (says Pipon) the legality of such courts, and see further the Queen's regulations, section 785 of edition of 1st January. 1868. The officers of courts of enquiry are not sworn, nor are the witnesses before them; and a soldier whose conduct is being investigated may decline to take any part in the proceedings, or to make any statements, but he may be present if he please. P. 171, Pipon, and see "Tytler," also Queen's regulations. No soldier is to be kept in confinement for more than 48 hours, without having his case disposed of, unless it be preparatory to his being tried by court martial. P. 34 of Pipon's Manual of Military Law of 1863 (citing the Queen's regulations). All offences for which a punishment exceeding seven days' confinement to barracks has been awarded are to be entered in the Regimental Defaulters' book. P. 35, Pipon. The defendant ordered a court of enquiry, in consequence of the missing of the boots referred to, and the report of the acting quartermaster, and a charge made by him against plaintiff, and plaintiff was put under The Court of Enquiry set to work, and finally reported that plaintiff's explanations (he having appeared before them) were unsatisfactory, and that the deficiency of boots was plain, &c. The Court was not a judicial body, and ordered nothing against plaintiff. On the 30th May, the Court was dissolved, and with it plaintiff's arrest. The Major General, having had the proceedings of the Court of Enquiry put before him by defendant, ordered plaintiff's discharge, not seeing enough to warrant a court martial against him. The defendant did not order plaintiff to be disgraced and sent back to the ranks, if by this be meant his being reduced in rank in the regiment, for he was not. Plaintiff has brought up, amongst other witnesses, a former Quarter-Master, Burden, whose evidence would exonerate plaintiff from liability for the missing boots. Burden I would not say a word against, nor would I against plaintiff, needlessly. Plaintiff's reputation stood good, and his character good, and it is to be lamented that the question of these missing boots arose. Burden has interest to prove that the 78 pairs paid for had really been made, and put into store. He has since had to pay for them, through deductions that he has had to suffer from his half-pay. The case we have before us does not involve the question of plaintiff's guilt or innocence in respect of the missing boots; the real

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question is as to defendant's liability towards plaintiff, in the manner and form charged by plaintiff, for the causes stated in the plaintiff's declaration. Captain O'Connor's evidence is important. He says: there was a discovery first of a deficiency of boots in the Quarter-Master's store, and plaintiff could not account for how many pairs he had made. The arrest was after a report by the acting Quarter-Master. The Court of Enquiry found the deficiency of boots plain, and that plaintiff's explanations were most unsatisfactory. Plaintiff was not reduced to the ranks, though put out of the shoemakership. As to his tools and private property plaintiff expressed to Capt. O'Connor satisfaction with an allowance made him (plaintiff) for them. Defendant might well have brought plaintiff to a court-martial that May, says O Connor. Much is made by plaintiff of his not having been shown to General Russell, but Captain O'Connor explains this away, and upon plaintiff's name not having been carried into the defaulter's list, but Captain O'Connor explains that only in cases of crimes or punishments are such entries made in said lists. On 30th May only was the Court of Enquiry dissolved, and of course plaintiff's arrest lasted while it lasted. The 48 hours rule relied upon by plaintiff's counsel I do not interpret as he does for this case, seeing that the Court of Enquiry was a proceeding preliminary and having in view a Court martial. (See page 34, Pipon.) Defendant then, simply, discharged plaintiff from arrest, says O'Connor. Finally, O'Connor says plaintiff was generally a well conducted man. Upon the whole, I have come to the conclusion that plaintiff's case is not made out. I have read of injustice by officers in the army towards subordinates; I have sorrowed over narrative such as Sommerville's, and of the Robertson court martial, and in my present office, I would not fail to pronounce for damages against any military officer guilty of mere wanton abuse of power. But we must not allow mere passion to prevail against right. It is most important that the discipline of the army be kept up, and that commanding officers working to that end be not hampered by fears of actions of damages in the civil courts against them. I find defendant not guilty of the charges laid against him. He had to move as he did, or be guilty of dereliction of duty. I hold that upon any charge against an officer or soldier being brought to the knowledge of a cammanding officer he ought to investigate it, and that he may cause a Court of Enquiry to assemble to ascertain the circumstances of the case. The defendant, in ordering the Court of Enquiry and arrest of plaintiff, did no more than he was bound to. TOME XXIII.

and the arrest was not maintained unduly. The defendant was not moved by malice. It is clear that boots have gone astray. Plaintiff asked and got pay for 78 pairs, yet, asked by Lieut. Liddell as to how many pairs he had made, he says 31 or 32. The Court of Enquiry and the arrest I cannot find to have been (under the circumstances) without any reasonable cause. Plaintiff has himself to blame in part for them, and it cannot help him that, at the Court of Enquiry, he says that, "when he made the statement to Lieut. Liddell he did not recollect." It is certain that he made the statement. We may allow that plaintiff did not make away with the missing boots, and that he really made all that he got paid for, 78 pairs; yet, non sequitur that his present action is to be maintained. It is dismissed, with costs. The following was the judgment: "The Court, doth maintain said demurrer of plaintiff, and dismiss said exception péremptoire en droit, with costs.—Then, adjudging upon the merits, considering that plaintiff has failed to prove his allegations material, among other things, that the acts of defendant complained of, and, particularly, in and about the putting of plaintiff under arrest, to wit, on the 18th May, 1867, were without probable cause, and done maliciously; considering that, before and after, and at the times of the acts and doings of defendant complained of, in and about the arrest and alleged imprisonment of plaintiff, he (the plaintiff) was an enlisted soldier in Her Majesty's army; that he was, therefore, subject to military law and jurisdiction; that defendant was his commanding officer, and, in doing what he did, (all that is proved against him in those matters) was acting under military law and within his jurisdiction. and bond fide, not moved by malice, nor without probable cause; that this may be held, although true it be, that the inquiry that was, upon or after plaintiff's first arrest resulted in plaintiff being discharged; considering that, unless clear excess or wanton abuse of power be, by a military officer like defendant (such excess or abuse of power not shown in this case), Civil Court ought not to interfere as in this cause plaintiff would have it; considering that defendant is not guilty of the trespasses and injuries against plaintiff complained of, and is not liable in damages whatever tow plaintiff, under the facts proved, and the circumstant this case; that as to plaintiff's tools and personal ects, alleged taken by defendant, plaintiff is proved to be we hout grievance against defendant; doth dismiss plaintiff's action, with costs, and doth order that defendant be freed and liberated from the capias ad respondendum against him

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issued, and that he be discharged therefrom and set at liberty." (17 J., p. 288; 4 R. L., p. 542; 2 R. C., p. 482.)

C. P. DAVIDSON, for plaintiff. S. BETHUNE, Q. C., for defendant.

ACTION OF DAMAGES FOR PERSONAL WRONGS .- COSTS.

COURT OF REVIEW, Montreal, 31st May, 1873.

COTAM MACKAY, J., TORRANCE, J., BEAUDRY, J.

WARNER et al., vs Rolf.

Held: That in a case of damages, for personal wrongs, in which the Court has awarded only \$5 for the damages, no greater amount than \$5 for costs can be allowed.

This was a review of a judgment rendered in the Circuit Court, at Sherbrooke, district of Saint-Francis, (Sanborn, J.) on the 3rd of April, 1873, awarding \$5 damages for personal wrongs, and costs as in an action over \$60 and under \$80.

PER CURIAM: The Court is of opinion to confirm the judgment, except as to costs; the 478th article of the Code of Procedure not allowing of a condemnation for a greater amount of costs than \$5. As the point was not raised by the party inscribing, he will not be allowed any costs in this Court.

The following was the judgment: "Considering that the only error in the judgment a quo is in its adjudication of costs, beyond what was or is lawful (478 Code of Civil Procedure), doth reduce the condemnation made by the said Court as to costs, and doth, by the present judgment, allow costs only to the extent of \$5, and doth confirm said judgment of the Circuit Court in all other respects; each party in revision to pay his own costs." (17 J., p. 292)

IVES & BROWN, for plaintiffs.

Borlase & Panneton, for defendants.

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ELECTION EXPENSES.

SUPERIOR COURT, Montreal, 31st March, 1873.

Coram MacKay, J.

WILLETT vs DEGROSBOIS.

Held:—That "The Corrupt Practices Prevention Act, 1860," of the late Province of Canada, is in force and applies to elections of members for the House of Commons of the Dominion and, therefore, that a note given for the payment of even lawful expenses connected with any such election is void in law.

PER CURIAM: Note and costs of protest are sued for \$263.03. Defendant pleads that, at an election at Chambly, for the House of Commons of the Dominion, he was a candidate on the 13th August, 1872; that before that, defendant placed with plaintiff \$60, to pay legal expenses (dépenses légitimes) of that election; that, after the election plaintiff informed defendant that the legal expenses (autorisées par la loi) had run up to \$310, and promised a detailed account; that, on the 27th September, plaintiff asked payment, and defendant, relying on the integrity of plaintiff, and the truthfulness of his statements, gave him the note sued upon; that, in dating the note 14th August, 1872, instead of 27th September, the plaintiff deceived defendant, "a surpris sa bonne foi;" never did plaintiff make the legal expenses for which note was caused; by dol et fraude has plaintiff gotten the note; that defendant has received no value for the note. It is not pleaded that the note is tainted with illegality, but defendant swears to his plea as true in all particulars. Willett, examined as a witness, explains that the debt was contracted on the 14th of August, and the note sent for signature in September was, therefore, dated August, and he says: "I called defendant's attention to it, in a letter that I wrote to him when I sent him the note for signature. The note was caused for money election expenses paid out by my son for defeudant; on the 14th August, the election was; I paid out so much for carters, my son paid expenses of briging voters from the townships, and for furnishing the voters with bread and cheese after the votation. August, 14th." It appears that, in August last, Dr. de Grosbois, intending to present himself as a candidate for the House of Commons, asked plaintiff to support him; which plaintiff said he would, provided defendant would pay his own expenses. The election proceeded; plaintiff was faithful, and spent hundreds of dollars in the service of defendant. The defendant pleads that he never

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authorized plaintiff to do more than spend money in "lawful expenses." Is it natural to suppose that plaintiff would have embarked in the work for defendant, had the latter used such an expression as "lawful expenses?" The expression would indicate caution by the speaker, would be indicative of limitations, and put the person addressed upon caution, too, if possessed of common-sense; such words are not commonly used by condidates at elections, seeking the support of friends. In less than two weeks after the election, plaintiff writes to defendant; defendant fyles copy of the letter, and gets plaintiff's admission of it: " You would much oblige if you would come and settle your election matters at once. I am tormented by the carters calling every day for a settlement; it will take about two hundred dollars; it may be a little more, and it may be a little less; but I want it settled. Yours, S. T. Willett, August 27th." Is this letter the information about only lawful expenses that defendant's plea refers to? Is it calculated to surprise the bonne foi of defendant? It gives defendant positive information of illegal expenses, and defendant during a whole month makes no protest, but, on Sept. 27th telegraphs to plaintiff: "Will my note at three months be all right? Plaintiff replies that he "will accept it, adding the interest." Sept. 28th, the note sued upon is received by defendant, in a letter from plaintiff Defendant signs the note and sends it to plaintiff. It is pleaded by defendant that this note was a surprise upon him, dated August, as it is instead of Sept. 28th. Here (says the plea) the plaintiff deceived the defendant, " a surpris sa bonne foi." Upon this ground, says the plea, the action is to be dismissed. But the Court is bound to do justice, and to consider everything, and not allow weight to arguments addressed to its weakness or stupidity. The defendant admits having received the note in a letter from plaintiff. Asked to produce the letter, he gives a poor apology for not being able to do so, he has lost it. This allows of plaintiff making secondary evidence of it, and he does so; he produces copy of it dated September 28th. It reads: "I beg to enclose your note to sign at three months from the day the amount was contracted, with interest added, &c. Please sign and return by mail." The defendant opened the letter, signed the note, and returned it, by mail; examined about the letter, he says that he did not read it; but can't swear that this is not copy of it. Is plaintiff now seen to have deceived defendant into signing a note dated August instead of September? We presume some things against those who lose letters that they have interest to lose. It interests justice that cases should come up unmutilated. The charge of deceit and fraud against plaintiff is proved unfounded; defendant's plea

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is untrue. As to good faith, I see none at all on the side of defendant. Another point is forced upon us, and is to be disposed of. It has been contended, at the final argument, beyond what has been pleaded, that a note like the one sued upon is void for illegality, whether the cause of it was legal expenses or illegal, of or about an election; and 23 Vic. c. 17 of 1860 (of the late Province of Canada) is relied upon by defendant. It is entitled "An Act for the more effectual prevention of corrupt practices at elections." Its section three makes it illegal to hire carters, or to promise to pay carters to bring or convey voters to or from the poll at any election. Section six makes "void in law every executory contract, or promise, in any way referring to, or arising out of, any Parliamentary election, even for the payment of lawful expenses. The B. N. America Act keeps this to be law in the territory of the late Province of Canada, says defendant. The plaintiff contends that this law of 1860 was only made to have force in or about elections for the Union of Canada that is, Quebec and Ontario; that that union being dissolved the law cannot work now, and nothing in it can effect anything connected with a Dominion election. Besides (says plaintiff) the Dominion Parliament has legislated upon the subject by the 34th Vic., c. 20. The defendant relies upon sec. 129 of the Brstish North America Act: "Except as otherwise provided by this Act, all laws in force in Canada at the Union shall continue as if the Union had not been made." That B. N. A. Act orders, in sec. 41, a continuance of the then existing election laws in the several provinces relative to the following matters, viz., qualifications of candidates and of voters, the proceedings at elections, etc., until the Parliament of Canada otherwise provides. Has sec. 129 left still to have force the 23rd Vic., cap. 17? I think it has; and we must hold that, though doing so, it be that we have this much law in Quebec and Ontario more than they have in Manitoba or Nova Scotia. The 34th Vic. is a law made for the Dominion, but even after it there was left in Quebec and Ontario the 23 Vic., c. 17, sec. 6. There is no incompatibility. The section 6 referred to is a law on the subject of certain executory contracts or promises, declaring them void in law. It is in force, and is fatal to plaintiff, seeing what has been proved. The fact of the Dominion Legislature having enacted the 34 Vic., c. 20, cannot help plaintiff. This was enacted for the whole Dominion, but in Quebec and Ontario there was left the 23 Vic., c. 17, sec. 6, in full force. Nothing is in the 34 Vic., c. 20, resembling what is enacted by sec. 6 of c. 17 of 23 Vic., against the executory contracts and promises referred to in it. I believe that the substance of this sec. 6 (supplet at an Legislegislaction was legislaction adversallow dismis

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Held:

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(supposing it never to have been enacted before) could be at any time made law in any Province by the Local Legislature, and it would not be ultra vires of such legislature under the British North America Act. So the action is dismissed, and plaintiff can get no sympathy, for he was bound to know that going into expenditures as he did for defendant he could not claim upon them in a Count of law, but would only have to rely upon the honor of his adverse party. Under the circumstances, however, I shall not allow costs against plaintiff. The action is, therefore, simply dismissed, and without costs. (1) (17 J., p. 293)

BETHUNE & BETHUNE, for plaintiff. Cassidy & Lacoste, for defendant.

CORPORATION.-LIBELLE.

SUPERIOR COURT, Montreal, 31st May 1873.

Coram Johnson, J.

L'Institut Canadien vs Le Nouveau Monde.

Held: That an action for libel may be brought by one corporation against another corporation.

Per Curiam: In taking up this case, I cannot help being struck by the fact that it is an action for slander by one corporation against another corporation. Nobody doubts that a corporation may be sued for libel; but this is the first case, within my experience, where a corporation has brought an action for libel. I do not mean to throw out any doubt about the right to do so, or to express myself one way or the other on the point, for it is not spec Scally before me by this record; I merely notice that it is the first case

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⁽¹⁾ Le ch. 17 des S. C. de 1860, 23 Viet., décrétait sec. 6: "Tout contrat ou toute promesse ou toute entreprise exécutoire, se rapportant en aucune manière, ou provenant, ou dépendant d'aucune élection parlementaire, me pour le paiement de dépenses légales, ou l'exécution de tout acte légal, sera nul en loi; mais cette disposition ne mettra aucune personne en état de recouvrer aucun argent payé pour des dépenses légitimes se rattachant à telle élection." Il a été jugé sons les dispositions de cette section, lesquelles n'ont pas été abrogées par l'Acte de la Confédération, sec. 41, et ont été étendues à toutes les provinces par le ch. 20 des S. C. de 1871, 34 Viet., secs. 2 et 9, qu'un restaurateur n'a pas d'action contre un candidat pour avoir, pendant une élection, fourni des rafraîchissements à une bande d'hommes réunis par ce candidat pour se rendre utiles au cas de besoin pendant l'élection. Johnson et vir vs Drummond, C. C., Montréal, ler avril 1873, Terrance, J., 17 J., p. 176; 4 R. L., 682, et 23 R. J. R. Q., p. 150.)

of the kind that I have ever seen. Assuming, as a general proposition, what is laid down in the books, viz., that a corporation may sue and be sued, just as any individual may be; or, at all events, assuming that, as far as the objects of the corporate existence are concerned, they are not to be injured without means of redress, and that, therefore, banks being authorised to deal in money, are not to be called insolvent, without any reason, and, yet, to have no action of damages; and that, in like manner, a literary institute is not to be falsely and maliciously charged with having perverted the objects of its constitution to infamous and immoral objects, I now address myself directly to the issue in the present case. The plaintiffs, by their declaration, apart from much that is irrelevant, charge defendants with having, in their newspaper, "without cause, reason or provocation whatsoever; but with premeditated malice, and with the single and malevolent design to do grievous wrong to the plaintiffs, and to disseminate publicly a false impression as to the contents of the printed catalogue of books in the library of the plaintiffs," printed and published the following article, which, as the words themselves are important, I will give as it appeared in the french language: "La bibliothèque de l'institut. Nous accusons réception du trop fameux catalogue des livres de la bibliothèque de l'institut canadien. Nos remerciments à qui de droit. Nous soupconnions bien quelque petite réticence, quelque léger mensonge quand M. Dessaulles criait à tous les échos du public que la bibliothèque de l'institut ne renfermait point de livres vraiment mauvais; mais nous ne le pensions pas capable, ayant la liste en question sous les yeux, de nier, comme il l'a fait cent fois, qu'il y ait dans ce catalogue un seul livre obscène; à l'entendre, il n'y avait là d'autres livres que ceux qui se rencontrent dans toutes les bibliothèques tant soit peu dignes de ce nom: certains traités de sciences abstraites; certains systèmes de philosophie naturelle, et quelques dictionnaires savants dont personne, ajoute-t-il, ne saurait se passer, bien qu'ils soient à l'index. Eh! bien, cela même est aujourd'hui prouvé faux : et au dire public de M. Boisseau, ce qui fait le fond de la bibliothèque de l'institut, et lui donne son vrai caractère, ce ne sont pas les ouvrages de la science incrédule, mais celle du roman obscène. Nous le répétons, c'est, avant et par-dessus tout, une bibliothèque de mauvais romans que l'évêque de Montréal a condamnée en condamnant l'Institut, et une source d'impurs poisons qu'il a fermée à ses ouailles. Nous avons fait un relevé du catalogue de M. Boisseau: or il ressort de sa liste que pour 291 volumes de religion, philosophie et économie politique, que

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compte l'Istitut, le nombre de ses romans s'élève au chiffre comparativement exhorbitant de 1,049 volumes, dont 129 d'un caractère tel que nous ne voulons pas salir cette feuille blanche de leurs titres ni les nommer aux lecteurs chrétiens: Alexandre Dumas, Alphonse Karr, Eugène Scribe, Emile Souvestre, Paul de Kock ne sont rien, tout mauvais qu'ils soient parfois. comparés aux impures obscènes et infâmes productions auxquelles nous ne pouvons que faire allusion. Il y a là des livres qui feront l'éternelle honte des lettres; des romans qu'au dire de Chateaubriand, un homme ne lit qu'en tremblant, ou, comme s'exprimait le cynique Jean Jacques Rousseau, qu'une jeune fille ne peut parcourir sans perdre sa pudeur; et qui suffiraient à eux seuls pour corrompre une ville entière. Voilà donc, d'après M. Boisseau, le vrai carectère, et le fond de la bibliothèque de ce platonique institut où l'esprit, dit M. Dessaulles, plane toujours si haut qu'on croirait qu'il échappe aux sens. Et l'on voudrait que l'Eglise se tut sur ce danger; que l'évèque de Montréal permit à la jeunesse l'école morale de l'Institut, en laissant pénétrer le poison au sein de nos familles, en un mot, qu'il se réconciliât et communicé de sa main d'évêque les acheteurs, les rétenteurs et les lecteurs excommuniés de ces livres? Allons donc!" This is the article incriminated by the present action, and the fact of its publication by defendants, as well as the unlawful motives imputed, must be established before plaintiff can be entitled to judgment. The plea of not guilty would have put in issue, in a perfectly sufficient manner, everything that the parties have a right to contend for; but, instead of logical and concise pleading, both parties have resorted to argumentative and voluminous written pretensions, upon every point that they conceived likely to throw light on the conduct or the meaning of either of them. In this mass of confusion, no legal mind can fail to see that there are but two points to be considered; the fact of publication being admitted, as it is by defendants' plea, we have only to enquire whether they have intentionally done the wrong imputed; and, if they have, whether their conduct has the effect of damaging plaintiff. It is to be regretted that a certain class of journalists seem to think that they have other privileges than those enjoyed by the rest of the public, so that, while, for mankind in general, one rule would seem to be sufficient, those who deem themselves clothed with some special mission or authority appear very often to except a degree of toleration which they are extremely loth to accord to others. The odium theologicum has long been of proverbial bitterness, but, in these days, every phase or craze of opinion that can find an advocate, as well as every remnant of authority that can speak with

power, seems to act, provided they have sincerely at heart the success of their views, as if it had some special immunity from the operation of laws regulating all civilized intercourse among men; and to imagine that no assertion can be too strong; no manners or expressions too coarse, if only they serve to make its notions prevail. Thus we daily see the most useful reforms kept back by the intemperance of their advocacy; and human liberty retarded, and even religion itself discredited and wounded by the recoil of the coarse and brutal weapons that more deservedly wound the hand the wields them than the heart at which they are aimed. It is not enough if a man should differ from some ascendant notion that he should be told that he differs, or that it should be shown that he differs without reason; but, upon the principle that orthodoxy is my doxy, and heterodoxy is another man's doxy, he is to be reviled and called a fool, or a drunkard, or an atheist, as the case may be for presuming to have an opinion at all, or for refusing to incur the responsibility of stifling his conscience and his reason. So, in the present case, we find that a catalogue of books having been sent in the ordinary course of business to a reviewer, he reviews it indeed; but his newspaper or review being of what is called the religious order, he cannot bring himself to review it as any one else would do. He is not content with disapproving one thing, pointing out the dangerous character of another, or even insisting on the general pernicious tendency of the whole, or of great part of the collection; but he must revile somebody, and say something personal, hard and insulting to him. In the present instance, it was M. Desaulles, whose name had long been connected with the Institut Canadien, who was selected for insult and opprobrium. He is told that he is a liar; and that the writer would have been surprised if he had turned out anything else, and other things of the same sort. It is impossible for a Court of Justice, laying down plain and honest rule to say that such language as this can be permitted, consistently with public order, to proceed from any source whatsoever, without severe censure; and most assuredly, if M. Dessaulles had been plaintiff here, neither the clerical order of journalism, nor the reverend name of the Roman Catholic Bishop of Montreal, which the writer so often uses, would have shielded defendant from punishment; but M. Dessaulles is not the plaintiff, and the case of the Institut Canadien alone has to be considered. It lies within a very narrow compass. The occasion of the publication complained of was the reception by the journalist of the catalogue of the Institut library. Boisseau, in his evidence, says it was sent in the ordinary course, the journalist thought,

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naturally enough, to be noticed, and he notices it; but if he neticed it fairly as regards the character of its contents, though he should needlessly have abused M. Dessaulles, who does not complain, he will not be liable ta pay damages to the Institut, unless his criticism on the whole can be shown to be, as in the de claration it is said to be, not a critique, but a cloak for malice. Most assuredly, this writer had a grave duty to do. He had to give and publish the opinion of an inflential journal upon the character and teudency of some of the books in a large public collection. How was he to do this duty? Was he to prostitute his pen to please and to applaud, if his conscience and his judgment told him he ought to censure and to condemn? Let us take one instance of what was before him, in order that we may appreciate what he ought to have done. It is proved in this case that Voltaire's works are in this catalogue, the edition in 70 volumes. Boisseau says, as a matter of fact, that ten volumes of this edition are missing and, to use his own words: " J'ai cru pouvoir supposer qu'ils se retrouveraient; mais il n'en est jamais rentré un seul." At page 25 of the catalogue that was reviewed, this edition of Voltaire in 70 volumes (but without the information that ten of them were missing) is mentioned as being in the library. Was the reviewer to presume that the catalogue was incorrect, or to take for granted that it was all right? He surely cannot be reproached for taking the latter course, and if he was led into error, the plaintiffs, at all events, who are the cause of that error, cannot complain. Taking, then, the instance of Voltaire's work,s which the editor assumed were there, as the catalogue informed him they were, is it unfair criticism, and evidently a mere cloak for malice on his part, for him to say, as he did, that Dumas, Karr, Scribe, Souvestre and De Kock were nothing compared with the impure, obscene and infamous productions to which he could only make allusion, and that he would not soil the page he wrote on by naming some of these books? Of course this Court is not called upon to know or to verify the real character of all Voltaire's works; but there are sources of information open to all educated men, which I am not supposed any more than my fellowmen to neglect; and if we'want decisive information on this point, we have only to turn to the foremost organ of free thought published in the English tongue (Westminster Review, April, 1861) and we shall find that though Voltaire, like a good many of his betters, was ridiculously enough, by those who had no better answer to give him, called an atheist, when he was only a satirist of abuses, some of his works, "La Pucelle d'Orléans," for example, and others, are infamous and abominable. Had

this reviewer no right to say this? Supposing, even, he was mistaken, which he assuredly was not, are not taste and morals things of sufficient importance to call upon us to protect them by protecting free and even mistaken criticism. where there is no dishonest motive behind? I could extend my observations, already too long perhaps, to show that not only in the instances selected, but in others complained of, this criticism, though severe, is not un justor uncalled for "Romans obscènes" is certainly a strong expression to characterize some of the works of Dumas or Karr, and of others not necessary to mention; it is more than this; is not only severe criticism, but in the true sense of the word, it is not criticism at all; it is denunciation and censure, which, howerer, rest upon the same foundation of right, if they proceed from just and proper motives, as criticism itself in its more general sense. It must be remembered, moreover, that the writer was noticing this catalogue, of which he justly assumed the correctness, from the point of view of the fitness of the library as the resort of a portion of the youth of our country. If that is his opinion, is he to be mulcted in damages for expressing it fearlessly and honestly? I think not; and if the case rested here, I should say that the Nouveau Monde had a fair occasion for offering its opinion, and that its opinion was unsparingly and honestly given in the interest of public taste and morals, and, with the exception of the personal attack on M. Dessaulles, which is quite indefensible, I should, so far, see nothing in this article which the Institut Canadien, or any other liberal institution or person, would not regret to see visited with legal condemnation. I can understand that others may even maintain this criticism to be wrong; but the press is open to them as it was to the critic, and they might review the reviewer. But that is not the question. A writer may be conceived to be mistaken in his opinion, or at fault in his taste; but if he is not dishonest in his motives, of which as far as this part of the case is concerned, I can see no evidence here, he is not to be condemned. But a perusal of the article complained of, and of the declaration of plaintiff, shows that this vehement condemnation of certain books, of which I have instanced some of the works of Voltaire as examples, is not all that is complained of; and that besides using the strong figure that the mention of their name would soil his paper, the writer is charged with saying more. He is charged with saying in substance that what made the foundation and staple of this library was obcene fiction, and that the Bishop was right in closing this source of foul poison to his flock. Now, I shall not enter upon any consideration of the quarrel between the Bishop and the Institute. It

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throws no light on the question before the Court, except as to the incidental point of his Lordship's approval of the catalogue; and I think it is clear from the evidence that it was not intended by the Bishop to express on that occasion any opinion, one way or the other, upon the contents of the library; but merely to signify that his authority not being acknowledged by the Institute, he declined to have anything further to do with the matter. There is enough and more than enough to show a deplorable state of dissension, not only between the Institute and the Bishop, but between itself and his own members. Let those whom it may concern fight this battle. I must proceed to consider the accusation against defendant under this second head, namely, that to bring this institution into contempt, it was further represented in the article complained of, not only that the catalogue, and therefore presumably the library, contained evil books; but that such were really the very stock and staple of it. The words are: "Son caractère est celle du roman obsène." Now, from the evidence of record, and from the catalogue before me, I am bound to give my verdict upon this issue of fact, and I do not hesitate to say that the imputation appears to me unjust and unfounded. Notwithstanding the presence of many works of light fiction and pernicious tendency in the hands of the young, I do not think it is right or true to say of this library that its predominating character is that of obscene literature. Upon such a subject as the tendency or character of a book, or of several books in a library, there may be more or less divergence of opinion; and none are better entitled to take a severe and lofty stand in considering or pronouncing upon such subjects than those who, like journalists, should feel a high, or, like ecclesiastics, a still higher responsibility; but, upon the general character of a library which contains thousands of volumes on history, philosophy, science, mechanism, poetry and art, though we may regret to see even one book that is immoral, or even hundreeds that a high and pure taste would deprecate, we ought not to allow ourselves to speak otherwise than justy and truly. This general and sweeping censure of the entire character of the library is not sustained by the evidence of record. It is in my judgment untrue, and therefore unlawful, and defendants according to the circumstances of the case are to be held responsible for it. If a public writer is moved by specially malicious motives, his responsibility will be heavy. If he is mistaken and honest, and does not far overstep the bounds of fairness and moderation, he will, in some cases, not be responsible at all; if zealous and anxious for what he deems right, he nevertheless inflicts injury by publishing what, with greater caution and enquiry, he might have altered or avoided, he will still be held liable for any injury he may have done to others. How far zeal, enthusiasm and intolerance are liable to be mistaken for truly honest motives, under the golden rule of doing to others as we would they should do to us, is a question painful for the educated to think of, and probably hopeless for humanity to solve; but, in the practical affairs of life, there must be one rule of right for all, and the limits of men's rights, as of those of journals, or of parties, whose organ they are, end at the point where they conflict with, and wound the rights of others. What this writer has published he is accountable for; but let us be careful and sure to see what he has published, and to distinguish it from what he has not published. He has condemned some books in this library, in which he was perfectly right. He has further condemned the general character of the library, in which I think he was as plainly wrong. Has he done this from malicious motives, or from mistaken zeal not incompatible with honesty of purpose? I think from mistaken zeal surely, and as far as honesty of purpose is concerned, I think he was bound to be more circumspect, and not to publish what was untrue for any purpose whatever. What he has written is in its nature necessarily injurious to the plaintiff. No specific damage is proved; and, indeed, the amount of damages asked seems to say that it is to established a right and not to obtain pecuniary compensation, that the action is brought. These damages then will be of nominal amount. Judgment for plaintiff. Damages for \$20, with costs as in an action for the amount sought in the present case. (17 J., p. 296)

LANCTOT & LANCTOT, for plaintiff. E. BARNARD, for defendant.

USUFRUCTUARY OF SHARES IN A BANK.

SUPERIOR COURT, Montreal, 30th April 1873.

Coram MACKAY, J.

Ross et vir vs Esdaile et al.

Held: That the usufructuary of shares of stock in the Bank of Montreal is entitled to the share or proportion of profits applicable to such shares, realized by the bank on the sale of all such shares of the increased capital stock as were unsubscribed for by those entitled to do so.

This was an action by the female plaintiff, as the usufructuary of 40 shares of the capital stock of the Bank

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Held: To justices of Provincial enforcement prised with the Crimin which give the procedu

This was justices of jurisdiction there being Saint-Fra still be How istaken oing to painful for hue, there f men's an they wound ed he is what he has not rary, in ned the was as tives, or of pura far as nd to be true for s nature amage is seems to in pecuese dam-

of Montreal, under the will of Catherine Ross, against defendants, as executors of that will, to recover \$2,607.60, as a bonus or profit made and declared payable on these shares by the bank, and collected and received by defendants from the bank. One of the defendants, Esdaile, (the other being the female plaintiff's husband) refused to pay over the amount so received from the bank, on the ground that it formed part of the capital of the estate, and was not, in reality, revenue, interest, dividend or profit on the shares. Esdaile did not plead to the action, but submitted himself to the judgment of the Court. The parties admitted that the amount claimed was "composed of the share or proportion of profits, applicable to the 40 shares of stock, which was realized by the Bank of Montreal, on the sale of all such shares of the increased capital stock of the bank, as were unsubscribed for by those entitled to do so (including the estate of Catherine Ross;) such profits being composed of the difference between the estimated value of the new or increased stock and the amount for which such unsubscribed shares really sold for." The Court took time to consider, and, after deliberation, gave judgment in favor of plaintiffs. (17 J., p. 301)

BETHUNE & BETHUNE, for plaintiffs.

CROSS, LUNN, DAVIDSON & FISHER, for defendant Esdaile.

CONSTITUTION.—PENAL STATUTES.—LICENCE ACT.

COURT OF QUEEN'S BENCH, CROWN SIDE. Sherbrooke, 12th October, 1873.

Coram Sanborn, J.

WARREN PAGE, Petitioner, and JOHN GRIFFITH, Collector of Inland Revenue, Respondent.

Held: That there is no right of appeal from the conviction of justices of the peace, under the Quebec License Act, and that the Provincial Legislature has jurisdiction to provide procedure for enforcement of penal statutes enacted with reference to subjects comprised within its powers, and that such penal statutes are not part of the Criminal Law as contemplated by the British North America Act, which gives exclusive power to the Parliament of Canada to determine the procedure in criminal matters.

This was a petition in appeal from summary conviction of justices of the peace, to this Court, as exercising appellate jurisdiction, where appeals are given to the Quarter Sessions, there being no Court of Quarter Sessions in the District of Saint-Francis.

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W. L. Felton, Q. C., for petitioner, submitted that the violation of any law to which a penalty is attached is a misdemeanor. I Russell, on Crimes, p. 49; Archbold, Small Edition, p. 2. That the Quebec License Act, 34 Vic., c. 2, section 195, refers to appeals and assumes the existence of the right. Section 150 makes the Act c. 103 of Consolidated Statutes of Canada applicable to the License Act, and both should be construed together, and the right of appeal, given under chapter 99 of the Consolidated Statutes of Canada, was general and applied to convictions made under chapter 103, and it was never intended that this right should be taken away. The right of appeal is given by 32 & 33 Victoria, c. 31 (Dominion statutes), and it should apply to cases of this kind, as part of the body of the Criminal Law of Canada

E. T. Brooks, for respondent, suggested that no right of appeal had been provided by law for a case like this, and cited the decision in the case of Pope and Griffith, 16 L. C., Jurist, p. 169, and 22 R. J. R. Q., p. 49. That chapter 103 of Consolidated Statutes of Canada contained no provision for appeal, and that chapter 99 was not made part of the License Act. That these Acts had been repealed by Dominion Act 32 & 33 Vic., c. 36, and that the Act 32 and 33 Vic., c. 31, gives only right of appeal from summary convictions in matters over which the Parliament of Canada has exclusive jurisdiction, as it is expressly declared by the first section of the Act

that the provisions of that statute so apply.

Sanborn, J.: This is a petition in appeal from a conviction made by justices of the peace against the petitioner, adjudging him to pay two penalties of \$50 each, for two separate violations of the License Act 34 Vic., c. 2, passed by the Provincial Parliament of Quebec, for illicit sale of spirituous liquors. The respondent, who was complainant before the justices, in his quality of Collector of Inland Revenue, submits that no right of appeal exists. Only two questions arise here: Had the Provincial Legislature power to provide the procedure for enforcing the penalties incurred under the License Act 34 Vic., c. 2? If it had, has a right of appeal been granted by said Act? As respects the question, I think the Local Legislature had such power. When the power is given by the British North America Act to the Parliament of the Dominion to provide procedure in criminal matters, I understand reference to be had to the general public Criminal Law, comprised in the Criminal Statutes of the Dominion and in the Common Law. This view is confirmed by the Criminal Procedure Act, which has no reference whatever to local penal laws but to laws in force throughout

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the Dominion. The same distinction obtained under the Statutes of Old Canada. Under 4 & 5 Vic., c. 25, which is a consolidation of the Criminal Acts relating to larceny, a right of appeal was given from summary convictions. Under 4 & 5 Vic., c. 26, which is a consolidation of the Acts relating to malicious injuries to property, a right of appeal is given from summary convictions. Under 4 & 5 Vic., c. 27, which is a consolidation of Acts relating to offences against the person. a right of appeal is given from summary convictions. Each Act made provision for appeal from convictions for offences created by such Act. The Act, chapter 99 of the Consolidated Statutes of Canada, gives a right of appeal from summary convictions "under the foregoing Criminal Acts," which include the provisions contained in all these three Acts before cited. When a right of appeal was intended to be given from summary convictions under local penal acts, such, for instance, as the Tavern License Act and Hawkers and Peddlers Act, Con. Stat. L. C., chapters 6 and 7, it was provided by the Acts themselves when and in what manner such appeal could be exercised. In this particular I differ from Judge Ramsay, although, in the main, adopting the reasoning used by him in the case of Pope and Griffith cited. I do not think there was any dislocation of the subjects of appeal in the consolidation. There never was any general right of appeal given under any of those statutes, only an appeal from convictions, made under the statute, where the right was conferred. This is further evinced by the fact that the right of appeal under Act of Dominion 32 & 33 Vic., c. 31, is secured only for summary conviction for offences over which the Parliament of Canada has exclusive jurisdiction. as will appear on reference to the first section of said Act. The British North America Act gives the Legislatures of the several Provinces power over shop, saloon and tavern licenses, and to impose fine, penalty or imprisonment for enforcing any law of the Province, made in relation to any matter coming within any of the classes of subjects enumerated among their powers. Where power is given by statute to impose a penalty, it implies power to enforce it. Dwarris, on Statutes, p. 23. The British North America Act must be understood to have given this power to the several Provinces. Any other view would give the Legislature of a Province less power than a municipality, which such Legislature can create. It would be contrary to the manifest intention of the Imperial Parliament in allocating the respective powers which each Legislature should possess. Coming to the second question, has a light of appeal been given by the License Act? It has not been given in terms. It implies the existence TOME XXIII.

of a right of appeal, but has not given it; nor has it provided means for exercising it, nor declared to what Court such appeal lies. It has made the Act Con. Stat. Canada, c. 103, so much thereof as was in force at the date when the License Act was enacted, a part of said Act. This last cited Act was the Act of the late Province of Canada, providing procedure generally for justices of the peace in all summary convictions. Although this Act has since been repealed by the Parliament of Canada, it is still applicable to the License Act, and, as respects that Act, is in force, as a procedure for summary trials for offences created by it by virtue of the 150th section of the License Act. This answers the objection made by petitioner's counsel that, unless the Summary Conviction Procedure Act of the Parliament of Canada is in force for cases under the License Act, there is no procedure to govern such cases. The License Act, as I have observed, gives no right of appeal. This right cannot be given by implication. It must be given in positive and express terms. Paley. on Convictions, pp. 249, 50, 51. There is, then, according to my understanding of the law, no right of appeal given for a case like this, and the petition cannot be received. Petition rejected. (17 J., p. 302)

W. L. Felton, Q. C., for petitioner. E. T. Brooks, for respondent.

QUEBEC LICENSE ACT .- CONSTITUTIONALITY.

SUPERIOR COURT, Sherbrooke, 1873.

Coram SANBORN, J.

WARREN PAIGE, Petitioner, and JOHN GRIFFITH, Collector of Inland Revenue, Respondent.

Held:—1° The tribunal constituted to adjudication upon complaints under the Quebec License Act consists of "two justices of the Peace for the District," and a conviction by three justices is illegal.

2° A conviction for selling liquor in the house of another is null.
 3° The conviction should be separate from the complaint.

4° The power conferred on the Legislature of Quebec by the B. N. A. Act, of "fine, penalty or emprisonment" does not restrict the power of the Provincial Legislature to the exercise of only one of these modes of punishment at a time by any particular Act.

of punishment at a time by any particular Act.

5° Where a conviction is for two offences, incurring two penalties, the conviction should specify for each offence the time, place, and pe-

nalty incurred.

SANBORN, J.: The petitioner raises six objections to the conviction made by three justices of the Peace whereby he is

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condemned to pay two penalties \$100, and cost \$28.46, for selling, by retail, spirituous liquors, in the Temperance Hotel of William Paige, of Compton, and, is ordered to be imprisoned for six months, unless the amount awarded is sooner paid. First: "That the tribunal constituted to adjudicate upon complaints under the License Act, as respects ordinary Magistrates of the District consists of "two Justices of the Peace for the District," and more or less than two does not meet the requirement." Secondly: "That there is no offence specified in the complaint to which penalty is attached." Thirdly: "That the conviction should be complete without reference to the complaint, and should be in the form provided by the Act." Fourthly: "That the conviction containing order of imprisonment upon the option of complainant being declared, is bad, as time must be given after conviction, for petitioner to pay, and then only, upon failure to pay, could the prosecutor declare his option for imprisonment without distress." Fifthly: "That petitioner had been illegally convicted of two offences without mention of the time when each was incurred." Sixthly: "That the evidence is illegally applied to both charges indiscriminately, and sustains neither as to specific time, as alleged in the complaint." There is a certain degree of force in all these objections. The conviction is obnoxious to criticism in all these particulars. As respects the first ground I consider it a fatal objection. Under section 152 of the License Act, all actions or prosecutions when the sum or penalty demanded, or such sum and penalty combined do not exceed one hundred dollars, may be brought before any two Justices of the Peace for the District, or a Judge of the sessions of the Peace or a Recorder, or a Police Magistrate or Sheriff. By subsection 2 of section 153, it is expressly declared that, when such prosecution is brought before any two other Justices of the Peace (that is, any two other than a Judge of the sessions, etc.,) the summons may be signed by one of them; but no other Justice shall sit or take part therein, unless by reason of their absence, or of the absence of one of them, nor yet in the latter case, without the assent of the other of them. This last provision was made, doubtless, to prevent justices unfavorable to the prosecution from coming in and taking the case out of the hands of those who were first seized of it, and to prevent unseemly divisions among magistrates; but the enactment cannot operate in one way and not in the other. There are certain expressions in the Act which seem to presume that more than two Justices may sit. Jurisdiction cannot be conferred by inference. It is expressly given to a cert in tribunal and none other can exercise it. Oke says: 'The special authority given to Justices must be exactly pursued according

to the letter of the Act by which it is created, or their acts will not be good." (1) The same author says: "Where the statute refers the matter to the next Justice, or to any two Justices, no other but the one answering that description, or those having jurisdiction by common law or Act of Parliament, has any authority and does not enable them to act in any county." (2) These special jurisdictions are numerous in England, created by various Acts, so much so that this author has provided a table showing under the various Acts giving summary jurisdiction, in one column the penalties, in another the right of appeal or otherwise, and in another the number of justices or the special tribunal to hear. The principle is recognized by other writers, and amongst these by Tomlins in his work on the Office and Duties of Justices of the Peace, and by Dwarris on Statutes, and by Paley on Con-The doctrine is based on several decisions, among which are the Saunders case, Kite and Lane, and Re Peerless. It is said by respondent the petitioner accepted the jurisdiction, by pleading and not objecting to it. This cannot give to a Court jurisdiction when it has none by law. Magistrates under penal acts have no jurisdiction except such as is conferred by statute and in the manner in which it is given by the statute. (3) Upon this ground the conviction must be quashed. There are other points raised here which are of sufficient practical interest to deserve consideration. The second objection, that no offence is charged, I do not consider good for the reason given that there should have been specific allegations that there was sale in less quantity than three half pints. The word "retail" under section 196 is made to mean this, and is a sufficient averment to meet the requirements of section 2. There is, however, a very important variance which was not mentioned in the argument. The complaint is, that petitioner did vend, sell, retail, &c., in the Temperance Hotel of William Paige. The penalty is incurred, under the second section of the Act, for selling in the person's own house, on premises, or in or upon any house, boat or barge, &c., upon frozen water; but not for selling in the house of another. Why this Act is so restrictive I cannot say; but it is so. It is true that, under section 170, the delivery of spirits in a tavern is declared a violation of the first

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⁽¹⁾ Oke's Magisterial Synopsis, p. 38.

⁽²⁾ Idem, p. 10.

^{(3) 3} Tomlins' J. P., pp. 120-4; Dwarris, on Stat., p. 53; Paley, on Convictions, pp. 15 and 16; Saunders' case, 1 Saunders, p. 263; Re Peerless, 12 Q. B., p. 643; Kite vs Lane, 8 C. L. R., p. 44; Regina vs Wilcocks, 53 C. L. R., p. 315.

⁽¹⁾ Cloud p. 125; Pale

⁽²⁾ Paley,

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and second sections, but this does not enable a party to sue for a penalty in any other terms than those mentioned in the second section. The Act very illogically makes a sale in a tavern proof of sale in one's own house, or upon one's own premises, or in a building upon frozen water, but it does not warrant a conviction unless the complaint is for an offence described in said 2nd section. The conviction must describe the offence according to the statute. (1) The third objection, that the conviction should have been in the form given by the Act and should be separate from the complaint, is not without reason. The Act says, "these forms or others of like effect." A conviction which is not perfect in itself is not a form " of like effect." There may be an informal conviction which may be extended. (2) In fact this is a common practice and it has been held that the formal conviction can be made at any time before the record is sent up on Certiorari. (3) It has even been held that such formal conviction can be drawn up and substitute. for the informal one at any time before the conviction is quashed. (4) The informal conviction as sent up in this case is certainly objectionable. The fourth objection is that the option of prosecution for imprisonment instead of distress is no part of the conviction and being included therein vitiates the conviction. The regular mode, undoubtedly, is, first to convict, then the defendant is expected to pay instanter; if he does not, the prosecutor may chose imprisonment under the Act, instead of distress. There is a reported case in which, under like circumstances, immediate imprisonment was held good, even when defendant was not present at the time of conviction. In that case, however, the conviction appears to have been entered, and the order for imprisonment was a subsequent act. (5) This adjudication of imprisonment, being a substantive part of the conviction, leads me to consider the question decided by M. Justice TORRANCE, as well as by M. Justice Drummond in the Papin case. (6) It is there held that the British North America Act does not confer power (S. 92, ss. 15) upon the Local Legislature to enforce laws made upon subjects within its jurisdiction by

Cloud vs Turfrey, 9 C. L. R., p. 596; Rex vs Walsh, 28 C. L. R., p. 125; Paley, on Convictions, p. 67; 2 Oke, p. 132.

⁽²⁾ Paley, on Convictions, pp. 61-2.

⁽³⁾ Selwood vs Mount 48 C. L. R., 55.

⁽⁴⁾ Charter vs Grecian, 66 C. L. R., 216.

⁽⁵⁾ Arnold vs Dimsdale, 75 C. L. R., 579.

⁽⁶⁾ Ex parte Papin, 22 R. J. R. Q., p. 527.

both fine and imprisonment at the same time. I cannot agree with this holding. The words of the Imperial Act are: " the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." It was held in the case referred to that only one of these modes of punishment could be exercised at one time, because the enactment is in the alternative, as indicated by the word "or." I think it was intended by this section to give the range of these modes of punishment, not one or other of them and only one at a time. The word "or" is not necessarily disjunctive in all cases. It is sometimes a mere connective. For instance Art. 325 of the Civil Code provides for interdiction in case of "imbecility, insanity, or madness." Ray, in his Medica! Jurisprudence, classifies under the general head of insanity, idiocy, imbecility, mania and dementia, and remarks: "It is not pretended that any classification can be rigorously correct; for such divisions have not been made by nature, and cannot be observed in practice." (1) The word "or" in this instance cannot certainly be used in a disjunctive sense. Dodderidge, J., in Creswick vs Rokesby (2) said: "When the sense is the same the words "and and 'or" are all one, and the words conjunctive and disjunctive are to be taken promiscue." I take it, at all events, that there is sufficient ambiguity in the expression to warrant a resort to the rules of interpretation where there is want of explicitness in the words of the statute. The B. N. A. Act, conferring legislative powers, is not to be construed rigorously, like a penal act conferring judicial powers. Prior to the B. N. America Act there can be no doubt that each Province had the power to enforce laws which now relate to subjects under the exclusive jurisdiction of the Provincial Legislature by fine, penalty and imprisonment, using discretion as to one or all, as circumstances might require. It is a generally accepted doctrine that where the Imperial Government has granted powers to a colony, it never withdraws them. This doctrine is recognized in Phillips vs Eyre. If the Imperial Act is to be understood in the restrictive sense, and the Provincial Legislature can only enforce their laws by fine, penalty or imprisonment, taking its option by one of the three modes, but by only one of the three modes, then a right and power which existed before that Act was passed has been taken away, inasmuch as the Provincial Legislature has exclusive jurisdiction over certain classes of subjects, and if it has not

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⁽¹⁾ Ray's Medical Jurisprudence of Insanity, p. 77, § 53.

⁽²⁾ Creswick vs Rokesby, 2 Bulsts., p. 47; Dwarris on Statutes, p. 773.

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the large powers that existed under the old constitutional acts, it has been taken away altogether; and the inference necessarily follows that it was intended, contrary to constitutional maxims of legislation, to abridge our powers, and it has been done. This conclusion should not be reached unless we are forced to it by explicit enactment or by evident intendment gathered from the Act generally. Chancellor Kent says: "It is an established rule in the exposition of statutes that the intention of the law-giver is to be deduced from a view of the whole and every part of a statute, taken and compared together. The real intention when accurately ascertained will always prevail over the literal sense of the terms." Again he says: "For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: 1. What was the common law before the Act? 2. What was the mischief against which the common law did not provide? 3. What remedy is provided to cover the defect? and 4, the true reason of the remedy?" Applying these rules in their spirit, we must consider what legislative powers existed in the several Provinces of the Dominion prior to the passing of the British North America Act, and was it the intention to abridge these powers, or simply to make a new distribution of them? I think, plainly, the latter. The words "by fine, penalty, or imprisonment," were not so well chosen as more definite language, to express the intention of the legislators, but I cannot think it was intended to give power to the Provincial Legislature to exercise only one of these modes of punishment at a time in any particular Act. It must have been intended to apply each according to the circumstances and gravity of the offence, and to use both or all when required. If the expression "fine, penalty, or imprisonment," is to be understood distributively as between penalty and imprisonment, it must be so understood as between fine and penalty which would create a distinction too subtle for practical application. In fact the words fine and penalty are so alike that the one runs into the other. Dwarris says: "In construing Acts of Parliament, judges are to look at the language of the whole Act, and if they find in any particular clause an expression not so large and extensive in its import as those used in other parts of the Act, and they can collect, from more large and extensive expressions used in other parts, the real intention of the Legislature, it is their duty to give effect to the larger expressions." For these reasons I am of opinion that the Provincial Legislature has not exceeded its powers in enforcing the License Act, or any other law relating to the class of subjects within its jurisdiction, by all the modes mentioned, used separately or together, according to

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circumstances. The conviction here is for two offences, incurring two penalties, and it is urged that the time and place should be definitely stated under section 158. This objection has much force. In such case the conviction should be full for each offence, specifying the offence, time, place and penalty. This is in accordance with English practice where similar law was in force. The sixth objection is that the evidence was taken illegally upon both charges indiscriminately. This was a matter within the discretion of the justices, and is not a ground for certiorari. The conviction will be quashed, but without costs, as the revenue officer acts on behalf of the Government. (18 J., p. 119)

W. L. Felton, Q. C., for the petitioner.

E. T. Brooks, for respondent.

INBURANCE.

COURT OF QUEEN'S BENCH, Montreal, 22nd June, 1875.

COTAM DORION, C. J., MONK, J., TASCHEREAU, J., RAMSAY, J., SICOTTE, J., ad hoc.

ROBERT TOUGH et al., Plaintiffs in the Court below, Appellants, and the Provincial Insurance Co., Defendants in the Court below, Respondents.

Held:—In the case of an interim insurance by an agent, in the following words: "Received from Messrs. Tough & Wallace, Coaticooke Post-Office (Coaticooke), the sum of \$20, being the premium for an insurance to the extendof \$2500 on the property described in the application of this date. Toronto, who shall have power to cancel this contract, at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant at the above post-office," that a notice by the company cancelling the contract, mailed to the applicants at the post-office, Toronto, within the thirty days, but not received in time for delivery by the post-office at Coaticooke until after the fire, had not the effect of cancelling the insurance.

This is an appeal from the judgment of the Court of Review rendered at Montreal, on the thirty-first day of May, 1873, Johnson, J., Torrance, J., et Beaudry, J., which reversed a judgment of the Superior Court for the district of St. Francis, Sanborn, J., rendered on the tenth day of December, 1872. Here follows the judgment of the Court of Review: "Considering that, by the interim receipt of the 19th March, 1872, defendants contracted with plaintiffs to insure the property therein mentioned, subject to the ap-

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proval of the Board of Directors in Toronto, who had power, at any time within thirty days from the 19th March, 1872, to cancel the contract, by causing a notice to that effect to be mailed to plaintiffs, and considering that defendants did, within the said thirty days so stipulated, to wit, on the 23rd March, 1872, cause a notice to be mailed at the Toronto Post Office, addressed to plaintiffs, as agreed upon in the receipt, and informing them that their proposal for insurance was disapproved and declined, and, in all things, as far as was in their power, conformed to the agreement, respecting the disapproval of the risk, and the notice thereof, and that, therefore, the contract for insurance was, on the 23rd March, 1872, determined; considering, further, that, in the ordinary course of the mail service, the notice of rejection to plaintiffs ought to have been received by them at 8.45 p.m., on the 25th March, but was delayed by storms, for which defendants cannot be held responsible; considering, further, that no policy of insurance was ever issued by the defendants to the plaintiffs upon their application of the 19th March aforesaid. Judgment of the Superior Court reversed."

Dorion, Ch. J., dissentiens: The appellants sue for the recovery of \$2,500, amount of insurance on certain property. The claim is made under an interim receipt which the agent of the Company gave them in the terms following: "Provincial Insurance Company of Canada. Head Office, Toronto. Provincial Receipt, no Agent's Office, Compton, March 19th, 1872. Received from Messrs. Tough & Wallace of Coaticooke (Post Office, Coaticooke), the sum of twenty dollars, being the premium for an insurance to the extent of twenty-five hundred dollars, on the property described in his application of this date, numbered -; subject, however, to the approval of the Board of Directors in Toronto. who shall have power to cancel this contract, at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant, at the above Post Office. And it is hereby mutually agreed that, unless this receipt be followed by a policy, within the said thirty days from this date, the contract of insurance shall wholly cease and determine; and all liability on the part of the Company shall be at an end. The non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said Board of Directors. In either event, the premium will be returned on application to the local agent issuing this receipt, less the proportion chargeable from the time during which the said property was insured. Said insurance is for two months from date. \$20.00 (Signed) JOEL SHURT-

LEFF. Agent." Notice was sent to the Directors at Toronto, and, on the 23rd of March, the manage: of the Company wrote to Tough & Wallace, declining the risk, and stating that the premium would be returned. His letter was mailed at Toronto on the 23rd, and, on the 25th, at midnight, a fire occurred, and the property was destroyed. The trains being delayed by a snow storm, the letter only reached Coaticooke next morning. The Company declined paying the amount of the insurance, on the ground that the only thing they were bound to do was to mail the notice to the party. The appellants, on the contrary, contend that the letter should have been mailed at Coaticooke before the fire; that the insurance subsisted until the letter reached Coaticooke. The case depends entirely upon the interpretation to be given to this interim receipt. The Judge who decided the case in the Superior Court said the letter should have reached Coaticooke in order to exonerate the Company. The Court of Review held that it was sufficient for the Company, whose principal office is at Toronto, to have mailed the letter at Toronto. The address of the party is mentioned as being at Coaticooke. I have the misfortune to differ from the majority of the Court here, and am disposed to confirm the judgment in review. The words "Post Office, Coaticooke," in the interim receipt, indicate the address of Tough & Wallace. It was at Coaticooke that they had their place of business. The Board of Directors of the Company had their office at Toronto. The contract was to be cancelled, not from the time the notice reached the parties insured, but from the moment such a notice addressed to them was put in the post office, whether it reached them or not, so that a notice reaching the Coaticooke post office on the night of the 25th of March before the fire, although delivered only after the fire, would have exonerated the Company. What was agreed upon was that in case the risk was rejected a notice to that effect addressed to the parties insured should be put in the post office, they taking the risk of its reaching them or not. The only question, therefore, is, which post office was intended? Was it the post office where Tough & Wallace resided, or that of the place where the Board of Directors carried on their business? If the former, why not deliver the notice at their place of business instead of at the post office? I think that under the circumstances the words, "by causing a notice to be mailed to the applicant at the above post office," must be held to mean, "by sending by mail a notice addressed to the applicant at the above post office, thus applying the Coaticooke post office as the place where the notice was to be

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17 J., j Doa Rite addressed, and not the place from whence the letter was to be sent by the Toronto Directors. Two Judges of this Court are of this opinion.

SICOTTE, J., also dissentiens: The interpretation of the

SICOTTE, J., also dissentiens: The interpretation of the contract to my mind is not susceptible of doubt. I cannot think it was intended that the insurance should remain in force until the letter reached Tough & Wallace.

MONK, J.: The majority of the Court think that the judgment in review should be reversed. There can be no doubt that the case is one of great nicety and some difficulty, as may be inferred from the diversity of opinion. The Judge in the Court below gave judgment in favor of the plaintiffs. The Court of Review was unanimously of opinion that that judgment should be reversed. Now two judges of this Court think the judgment in Review is correct. The bench, therefore, is about equally divided. As I view the case, if the Company wished to protect themselves, they should have guarded against ambiguity in their interim receipt. They should have said "mailed at Toronto." But I do not consider the receipt ambiguous, for it says the notice should be mailed "at the above post office." What post office was it? Plainly it was the post office at Coaticooke. Mails are sometimes detained a week or ten days by snow-storms in the month of March. Could it be pretended that the contract would be annulled by a letter mailed at Toronto, and that the party during all that time would remain uninsured? The Court has very little hesitation in saying that this view cannot be entertained.

TASCHEREAU, J., concurring, remarked that where the clauses which are framed by the companies are ambiguous, the interpretation least favorable to the Company should be followed.

RAMSAY, J.: I concur with Judge Monk. The whole question is, what is the meaning of mailing at a post office? It must mean mailing at the place where the person is to whom the letter is addressed. There was no use in mailing at Toronto, because the object would not be attained; the parties would be left without knowledge that they were not insured.

Judgment of Court of Review reversed. (20 J., p. 168, et 17 J., p. 305)

DOAK & FISK, for the appellants.

RITCHIE & BORLASE, for the respondents.

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PATENT ACT .- INVENTOR.

COURT OF QUEEN'S BENCH, Montreal, 15th February, 1875.

Coram Dorion, C. J., Monk, J., Taschereau, J., Sanborn, J.

WOODRUFF, appellant, and MOSELEY, respondent.

Held: That the mere importer of an invention, which has been patented for many years in the United States by some other party, is not the inventor or discoverer thereof within the meaning of "The Patent Act of 18°9;" and a patent obtained by him under the said Act, on the ground that he was the inventor or discoverer, is null and void.

This was an action of damages for an alleged infringement of a patent for invention issued under "The Patent Act of 1869," and called and known as "the racking and vacuum art of tanning and apparatus therefor," and of which the plaintiff claimed to be the assignee. The defendant, specially denying that the pretended patentee was the true inventor or discoverer, as alleged in the plaintiff's declaration, and putting that fact distinctly in issue, pleaded amongst other things that the process or art pretended to be protected by the patent had been in use for years previous to the issuing of such patent in the U.S., and had been patented there as far back as the year 1865, by a party other than the person named in the Canadian patent, and that the apparatus used by defendants was borrowed from one in use in Peabody in the U. S., and not in any way from that pretended to have been patented by the person named in the Canadian patent. The plaintiff admitted that the person named in the Canadian patent was not the "inventor," but pretended that he was the "discoverer," because he had discovered it as being in use and patented in the U.S. The Superior Court, at Montreal, on the 26th September 1873, Beaudry, J., dismissed the action, with costs, assigning the following reasons: "Considering that defendants have established the material facts alleged in their plea, and namely that George Scoullar, whose rights have been assigned to plaintiff, was not the inventor or discoverer of the improvement in plaintiff's declaration mentioned, but that the same was, long before the issuing of the Letters Patent of the 13th January, 1871, in use and patented in the U. S., and that defendants copied, as near as possible, said improvement used and patented in the U.S."

BORLASE, for appellant: It is submitted that the above judgment is incorrect in law. Before the passing of the Statute of Monopolies, 21 J. 1, c. 3, the Crown had power at Common Law to make grants of the sole use of inventions.

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Thus, in the case of monopolies, Darcy vs Allin, Nov R. 182. it is said that: "When any man, by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm; that in such cases the King may grant him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth, otherwise not." In Sheppard's Abridgment, Part III, tit. Prerog., p. 61, it is laid down that it is generally held by the Judges that the King may for a reasonable time grant a monopoly patent of that which a man may at his own charge, wit, and invention bring in as a new device into the realm, or any new engine tending to the furtherance of it for the good of the realm. Sergeant Hawkins is of the same opinion. Hawk. P. Cr. bk. I. c. 79, § 20. So also Sir Edwar | Coke, 3 Inst., 184. See also Hindmarch on Patents, pp. 7, 8, 9, 27. The statute above referred to, by which monopolies are prohibited, excepts from its operation "Any letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made. of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use, so also they be not contrary to the law or mischievous to the state, &c." The introduction of a new trade from abroad is an invention within the meaning of the statute, though the articles the production of such trade had been introduced into England before, but there must have been no practising or using of the trade within the realm or its dependencies; so the introduction of a new machine is also an invention within the statute, and can be the subject of a patent. Billing's Law of Patents, p. 67; Lewis vs Marling, 10 B. & C., 22. In Edgebury vs Stephens, 2 Salk., 447, it was held that if an invention be new in England, a patent may be granted, though the thing was practised beyond the sea before; that the Act intended to encourage new devices useful to the kingdom, and whether learned by travel or study it is the same thing. "This case has ever since been acted upon as law, and indeed there is no subsequent case reported in which the validity of a patent has been questioned, on the ground of the invention comprised in it being a foreign invention, and merely imported into this country by the patentee." Hindmarch on Patents, p. 28. The law as thus interpreted in England is formally reproduced in the Canada Act respecting patents for inventions, C. S. C., cap. 34, section

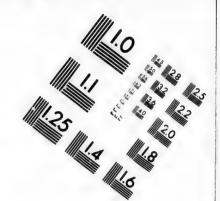
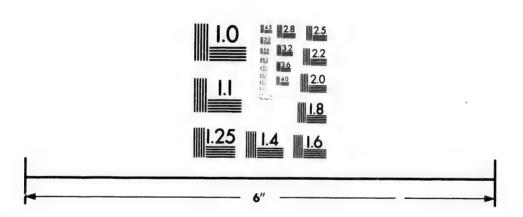


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3, of which enacts that certain persons having "discovered or invented" new and useful arts, machines, &c., shall be entitled to obtain patents, and by the 10th section of which it is provided that the privileges, &c. conferred by the Act "shall extend to and include any subject of Her Majesty, being an inhabitant of this Province, who in his or her travels in any foreign country has discovered or obtained a knowledge of, and is desirous of introducing in this Province, any new and useful art, machine, manufacture, or composition of matter, not known or not in use in this Province, before his application for a patent for the same." This section of the Act contains an exception as to arts, &c., discovered or used in the United States of America, or in Her Majesty's Dominions in Europe or America, which exception, however, is not made in the Patent Act of 1869," under which the appellant's patent was issued. The sixth section of the Patent Act of 1869, under which the patent now in question was granted, enacts that "any person having been a resident of Canada for at least one year next before his application, and having invented or discovered any new and useful art, &c., may obtain a patent." Sections twenty and twenty-four indicate the remedy to be adopted in case of infringement. It is not easy to see why the term "inventor" or "discoverer" should receive a different interpretation here from that which has prevailed in England for upwards of two hundred years, and the Legislature does not seem to have contemplated any change or to have supposed that any change was in effect made in the law, either by C. S. C., c. 34, or by the Act of 1869, and this is at once apparent on reference to the Patent Act of 1872, which does change the law. The sixth section of that Act enacts that "any persons having invented, &c.," omitting the word "discovered," and the seventh section provides that: "An inventor shall not be entitled to a patent for his invention, if a patent therefor in any other country shall have been in existence in such country more than twelve months prior to an application for such patent in Canada." This is entirely new law, but the Court below seems to have been misled by supposing it to be applicable to the present case. By section thirty-two of the act of 1872, all existing Provincial and Dominion patents are to remain in force, notwithstanding the repeal of the previous Statutes thereby effected. The appellant cannot conceive that the objection taken on behalf of the respondent to the validity of the first assignment made to him by Scoullar can have been seriously intended. Section eight of the Act of 1869, which provides that a patent may be granted to the assignee or devisee of the original inventor or discoverer, seems effectuall matt assig ferre ment assig

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tually to dispose of it, and if there were any doubt in the matter it would be removed by the fact that by the second assignment, made after the patent was issued, Scoullar transferred all his interest therein to the appellant. The judgment appealed from also admits that the appellant is the assignee of Scoullar.

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Bethune, Q. C., for respondent: The attention of the Court is invited, in the outset of this discussion, to appellant's answer to the 9th articulation: "It is admitted, that it was not invented by said George Scoullar, but it is expressly denied that he was not the discoverer, plaintiff's pretensions being, that it was discovered by George Scoullar, as being in use and patented in the United States." No evidence of any kind was adduced by appellant, that George Scoullar was the "discoverer" of the apparatus in question, either in the proper and legal sense (that of originator), or even in the modified sense contended for in the above answer to the 9th articulation of facts. The want of such evidence, it is submitted, was of itself fatal to the appellant's action; the fact of Scoullar being such discoverer having been distinctly put in issue. Hindmarsh, on Patents, pp. 442, 443. And Ritchie vs Joly, 12 L. C. R., pp. 49, 50-52. (1) On the assumption

(1) Le ch. 34 de S. R. C. de 1859, intitulé "Acte concernant les patentes ou brevets d'invention," décrétait sec. 3 (reproduisant le droit antérieur) que : "Quiconque, sujet de Sa Majesté, et résidant dans cette province, a découvert ou inventé quelque art nouveau et utile, machine, manufacture ou composition de matière-ou quelque amélioration nouvelle et utile dans quelque art, machine, manufacture ou composition qui n'était pas connue ou employée par d'autres personnes en cette province avant qu'il en eût fait la découverte ou l'invention, et qui, lors de la demande d'un brevet ou patente. n'était pas en usage général ou en vente en cette province, de son consentement comme en étant l'inventeur ou le découvreur-et désire obtenir le droit de propriété exclusive dans ladite invention-pourra exposer tel désir au moyen d'une pétition adressée en la manière prescrite par cet acte, au gouverneur de cette province; et le gouverneur, les formalités prescrites par cet acte remplies, accordera le dit brevet, lequel sera bon et valable pour le concessionnaire, ses hoirs, représentants légitimes ou ayants cause, pendant l'espace de quatorze ans à compter du jour où il sera accordé, après que les lettres patentes auront été enregistrées en la manière prescrite par cet acte; et dans le cas d'un transport dudit brevet avant l'obtention d'icelui, il vaudra pour la même période, après que ledit transport aura été enregistré au bureau du ministre de l'agriculture." La sec. 22 dudit chapitre se lisait ainsi qu'il suit : " Toute personne, ou toute corporation établie en cette province, qui aura acheté, construit, inventé ou découvert comme susdit, aucune nouvelle machine, manufacture ou composition de matière anterieurement à la demande d'une patente pour le même objet de la part d'une personne qui prétendra en être l'inventeur ou découvreur, aura le droit d'employer et vendre à d'autres, pour qu'ils l'emploient, la machine, manufacture ou composition particulière de matière ainsi faite, achetée ou importée, sans encourir pour cela aucune responsabilité envers le breveté ou aucune autre personne intéressée dans ladite invention ; et l'achat, la vente ou usage qu'on aura fait de ladite invention antérieurement à la demande d'une patente ou brevet comme susdit, ne seront point considérés comme ayant l'effet d'annuler ladite patente, à moins qu'il ne soit prouvé qu'il a été fait un abandon that Scoullar had discovered the apparatus to have been in use and patented in the United States, and that the appellant had really proved that fact (which he never even attempted to do), the appellant's counsel has argued that he was a "discoverer," within the meaning of the statute and of the patent issued thereunder. Now, when the "Patent Act of 1869" was passed, the law on the subject of "Patents for Inventions," in force in the old Province of Canada, was chapter 34 of the Cons. Stat. of Canada. Under the heading,—Who may obtain a Patent," &c., it was enacted by the 2nd section of this Consolidated Statute that any subject of Her Majesty resident in the Province, having "discovered or invented" any new and useful art, &c., not being known or used by others in the Province with his consent, might obtain a patent therefor. And under the subsequent heading " Patents for inventions brought by Canadians from Foreign countries," it was provided by the 10th section of the Act that the privileges, &c, secured by the Act "to the inventor and discoverer," were extended to and made to include any subject of Her Majesty, &c., who had "discovered or obtained a knowledge of," and was desirous of introducing in the Province any new and useful art, &c., not known or of use in the Province except inventions or discoveries "made or used

au public de ladite invention, ou que ledit achat, vente ou usage qu'on a fait de ladite invention a eu lieu ou existait plus d'une année avant ladite demande d'une patente." Il a été jugé, sous ces dispositions, que celui qui poursuit en dommages pour violation d'un brevet d'invention doit prouver d'abord qu'il est l'inventeur de la machine décrite dans son brevet, qu'il peut se borner à cette preuve et attendre que le défendeur prouve qu'il n'est pas le véritable inventeur, et que, si le défendeur ne fait pas cette preuve, le brevet sera considéré valide ; que si, par la preuve faite, les jurés sont con-vaincus que la découverte de l'invention a été suggérée au demandeur, qu'elle n'a pas pris naissance dans son esprit, et que le demandeur a été aidé dans sa découverte par une autre personne, que cette personne ait fait ou non connaître son invention, ils peuvent légalement déclarer que le demandeur n'est pas l'inventeur; que l'inventeur n'est pas exclusivement celui qui, le premier, publie une description de l'invention; que si les jurés sont convaincus que l'invention était d'usage public ou connue lors de la demande du brevet, ils peuvent déclarer que le demandeur n'a pas droit au bénéfice de son brevet; que les mots usage public signifient l'usage en public soit dans un seul cas ou dans plusieurs; que l'usage en public, même dans un seul cas, du consentement du demandeur et longtemps avant la demande du brevet, de manière à faire présumer que le public à eu connaissance de son invention et en a connu le secret, peut légalement être considéré comme un abandon par le demandeur de ses droits au brevet ; que si le demandeur s'est servi de son invention, soit dans sa boutique, soit ailleurs, de manière à ce qu'une autre personne ait pu en prendre copie, plus d'un an avant la demande du brevet, on est justifiable de conclure qu'il en a fait usage en public, qu'il a abandonné l'idée d'obtenir un brevet et qu'il a renoncé à tous ses droits à cet égard. (Ritchie vs Joly, C. B. R., en appel, Québec, l4 décembre 1861, LARONAINE, J. en C., AYLWIN, J., MEREDITH, J., et MONDELET, J., dissident, confirmant le jugement de C. S., 12 D. T. B. C., p. 49 et 10 R. J. R. Q., p. 140 149).

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in the United States of America, or in any part of Her Majesty's Dominions in Europe or America, which were to be free for importation into the Province, for sale or use there. And by the 11th section of the Act it was enacted, that the person seeking a patent for any such useful art, &c., as the 10th section allowed to be so introduced and patented. had to make a solemn declaration that "he believes himself to be the first introducer or publisher of such art, &c. perfectly plain, therefore, that our Legislature never intended to attach to the word "discoverer" the meaning claimed for it by the appellant, but, on the contrary, distinguished, in a marked manner, between the "discoverer" and a person in the position claimed for Scoullar; making the latter an "introducer or publisher." Not only did the Legislature thus distinguish between a "discoverer" and a mere "intro ducer or publisher," but it also carefully prohibited the granting of a patent for an invention already patented and of use in the United States, or in any of Her Majesty's Dominions. The "Patent Act of 1869" did not wholly repeal said ch. 34 of the Cons. Stat. of Canada; so much thereof only being repealed thereby as is "inconsistent" with, or makes "provision in any matter provided for by" said "Fatent Act of 1869." Now, under the heading "who may obtain Patents?" the "Patent Act of 1869," in its 6th section, designates the party entitled to a patent as a "resident of Canada for at least one year," who has "invented or discovered" any new and usesul art, &c., "not known or used by others before his invention or discovery," or not being in public use or on sale in any of the Provinces of the Dominion with his consent. And, on the subject generally of "Patents for inventions brought by Canadians from foreign countries," the "Patent Act of 1869" is entirely silent. In the 7th section of the "Patent Act of 1869," special provision is made, in favour of an "original and true inventor or discoverer," to obtain a patent for any invention or discovery patented by him "in any other country, at any time within six months next preceding the filing of his specification and drawing." And by sec. 40, sab.-sec. 4, the Commissioner of Patents is directed to refuse patents, where the invention or discovery has already been patented, except when the case is one within the said 7th section. Except, therefore, in the special case of the "introducer or publisher" being the "original and true inventor or discoverer," and patentee, no provision whatever was made by the "Patent Act of 1869," respecting "patents for inventions brought by Canadians from foreign countries." It follows, consequently, that the Dominion Legislature intended, either that the portion of the Con-TOME XXIII.

solidated Statute having reference to inventions from foreign countries should still continue in force, quoad the late province of Canada, or to limit the granting of a patent in such cases to that of the "original and true inventor or discoverer, who should also be the patentee, and whose patent in the foreign country was taken out without the six months next preceding the filing of his specification and drawing. Clearly then, whether this portion of the Consolidated Statute was really repealed or not, by the "Patent Act of 1869," George Scoullar, who only pretends to have been a mere "introducer or publisher," could not, even if he were really so (a fact in no way proved by the appellant), have legally obtained a patent for what had been well known and in use in the United States, and patented there, as far back as the year 1865. Moreover, on the very authorities cited by the appellant's counsel, with regard to patents issued in England, it is clear that even there the application could not be as that of the *inventor* or discoverer in a case like the present, but would require to be made as that of the *importer*. Hindmarsh, pp. 26-29. It is also the be observed, that under the "Patent Act of 1869" (sec. 22), the only provision for an assignment of a patent refers to one actually issued; the words of the statute being,—"every patent ** whensoever issued; shall be assignable in law." Until so issued then, the patent is not assignable in law. The assignment, therefore of the 3rd of Oct., 1870, of 7ths of the alleged patent rights, is a mere nullity. It is also worthy of notice, that Scoullar's pretended specification and drawing and both assignments were executed in Boston, where the appellant resides. Taking this circumstance into consideration, coupled with the attempted assignment of 7-8ths of the supposed patent rights before the issuing of the patent, and the very small consideration stated in the assignments (\$100 in the first instance and \$1 in the second), it is manifest that Scoullar merely lent his name to the appellant, and that, in reality, the whole affair was a fraudulent scheme of the appellant, who was not a resident of Canada, surreptiously to secure the monopoly of a right which he could not otherwise abtain, and that he has consequently no claim whatever to the sympathy of our Courts.

Sanborn, J.: The question involved in this appeal is, whether a patent for an invention obtained under the Patent Act of 1869 can be sustained when it appears that the principle patented had been previously patented in the United States, or, in other words, could an introducer of an invention or discovery, for which the real inventor or discoverer had obtained a patent in the United States obtain a valid patent for such invention or discovery here, except the case of the ori-

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ginal inventor, under sec. 7 of 32-33 Vict., ch. 11. Under the provisions of ch. 34 of C. S. of C., persons who in their travels in a foreign country had discovered any new and useful art, machine, manufacture or composition of matter, not then known or in use in the late Province of Canada, and being desirous of introducing the same into Canada, were permitted to obtain a patent therefor, in the same manner as original inventors. The United States and the British Dominions were, however, expressly excepted from this provision. It is contended that inasmuch as the Patent Act of 1869 repeals chapter 34 of the Consolidated Statutes of Canada and all previous Acts, and says that any person having been a resident of Canada for a year prior to the application for a patent, who has invented or descovered any new and useful art, machine, manufacture or composition of matter or any improvement thereon, not theretofore known or in use, or on sale in the Dominion, may obtain a patent therefore; an introducer of an invention from the United States, as the discoverer thereof, may legally obtain a patent therefor, though not the real inventor. If it be understood that the provision in chapter 34 of the Consolidated Statutes of Canada relating to introducers, is not repealed by the Act of 1869, which repeals all laws inconsistent with that, then the United States would remain excluded, as a foreign country, from which introducers could bring inventions to be patented here. If the Act of 1869 is understood to repeal chapter 34 as regards introducers, which we think is the case, then we have to interpret the 6th section of the Act of 1869. The word "discover" in this clause is synonymous with "invent," and does not refer to the discovery of an introducer but to the invention or discovery itself. The word "discover" is a more accurate designation of the application of a new principle in cases of combination of substances or compositions of matter than the word "invent," which relate more particularly to machines or manual devices. Webster says "discover" differs from "invent." "We discover what before existed, though to us unknown; we invent what did not before exist." It is plain that the Act of 1869 did not intend to give introducers the right of obtaining patents from the whole tenor of the Act, and particularly sections 39 and 40 shew that discovery means the same as invention, because it would be absurd to allow a caveat to an introducer; and by subsection 4 of s. 40, the commissioner may refuse a patent where it appears that the invention or discovery has already been patented, except as provided in section 7, which gives the original inventor or discoverer a right to obtain a patent within six months after the invention has been patented by him in another country. The patent in question in this cause being of an invention already long before its introduction here patented in the United States, and the patentee not being the original inventor or coming under section 7, the judgment of the Court below holding it void is right.

Judgment of Superior Court confirmed. (17 J., p. 306, et

19 J., p. 169)

RITCHIE & BORLASE, for appellant. BETHUNE & BETHUNE, for respondent.

PROMISSORY NOTE GIVEN IN CONSIDERATION OF DISCHARGE OF INSOLVENT.

COURT OF QUEEN'S BENCH, Montreal, 19th September, 1872.

Coram Caron, J., Drummond, J., Badgley, J., Monk, J.

James Doyle, Defendant in the Circuit Court, appellant, and Amable Prevost et al., Plaintiff in the Circuit Court, Respondents.

Hell:—That a note of a third party, given by an insolvent to a creditor, to obtain the creditor's consent to the discharge of the insolvent, is null and void.

The Court of Appeals, by its judgment, reversed the judg-

ment of the Circuit Court appealed from.

Monk, J., remarked that the same point arose in this case as in the case of Prevost and Pickel, decided by this Court, in March last. He dissented in that case, but seeing the decision in that case, and that the Court was of the same mind still, he would not enter any dissent in the present case.

The judgment of the Court is as follows:—"The Court, Considering that appellant, defendant below, hath established the material averments of his plea filed to the action and demand of respondents against him, upon his promissory note in their favor; Considering that the promissory note was received from him by respondents, without any consideration therefore to him by respondents; Considering, further, that respondents were proved creditors against Michael Martin, an insolvent, and against his insolvent estate and that the promissory not was given to and received by respondents as such proved creditors of insolvent as an inducement by them to consent to receive the composition offered by insolvent to his creditors generally, including respondents, and for his discharge thereby by his creditors, as offered by his deed of

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this case is Court. eeing the the same sent case. he Court, tablished ction and sory note note was ideration her, that artin, an the prots as such them to nt to his his disdeed of composition and discharge in that behalf, under the provisions of the Insolvent laws in force in this Province; Considering that respondents did accept the said inducement and did in fact assent to the said deed of composition, accepting the said composition, and assenting to the discharge of the insolvent, in consideration of the promissory note so received by them as such inducement therefor; Considering that the promissory note was a void contract between appellant and respondents, and constituted a fraud upon the insolvent laws, and was therefore prohibited under the penalty of forfeiture by the said laws provided; And considering that, in the judgment of the Circuit Court, sitting at Montreal, on the 31st of October, 1871, there was error, doth set aside and reverse the same and, proceeding to render such judgment as the Circuit Court should have rendered, doth dismiss the action, with costs." (17 J., p. 307)

PERKINS, MONK & FORAN, for appellant. DUHAMEL & RAINVILLE, for respondents.

PRIVILEGED COMMUNICATIONS. - EVIDENCE.

Superior Court, enquete sittings, Montreal, 6th November, 1873.

Coram TORRANCE, J.

THE PACIFIC MUTUAL INSURANCE COMPANY OF NEW YORK VS BUTTERS.

Held:—That communications, between principal and agent, will be protected, if they formed part of the preparation or preliminary investigation which the party made with reference to the cause.

Torrance. J.: The action was to recover premiums of insurance. Plea, that the only sum for which defendants were indebted to plaintiffs, was \$4,496.32, from which defendants were entitled to deduct 15 per cent. on the amount of all the premiums chargeable; and defendants, further said that plaintiffs were indebted to defendants in \$3,693.97, for loss incurred by defendants, on divers insurances against loss, made by defendants with plaintiffs upon divers cargoes of grain, which risks were accepted by plaintiffs, who received the premiums therefor, and which losses were fixed and ascertained and recognized and accepted by plaintiffs, who acknowledged their liability and promised to pay the same, and defendants, therefore, pleaded compensation as to this

amount. At Enquête, John Popham, agent, at Montreal, of plaintiffs, was sworn as a witness for defendants, and was asked respecting letters, papers, or correspondence under his control, relating to insurance upon the cargo of the steamer "St. Patrick," and the following question among others was put: "You are now asked to produce the letters and copies of letters referred to by you in your preceding answers, and any papers and documents you have in your possession, referring to the said loss, for communication, will you do so?" Answer. "All the letters, papers and correspondence, which have passed between me and plaintiffs, relating to the alleged claim on the "St. Patrick," took place, as already stated by me in my preceding answers, subsequent to the claim made by defendants on plaintiffs', and to my refusal to recognize the claim and are all of a strictly confidential nature, having reference to the plaintiffs' grounds and evidence for resisting the claim, and plaintiffs' instructions how he was to act in the matter." Question: "Will you produce the said papers, or do you refuse to do so?" Answer: "I refuse to produce them, as they are privileged." The question here is whether communications between principal and agent, in relation to the loss out of which this claim has arisen, and produced by the loss, are privileged. As a general rule, communications to a legal adviser, or priest, are privileged, and those to a medical adviser and ordinary agent are not privileged in the witness box. But it appears to me that communications like those under consideration should be protected. Taylor, on Ev., § 839, says: "With respect to the production of title-deeds, the protection has been held applicable to the case of trustees and mortgagees, who cannot be compelled, either to produce the deeds of the cestui que trust, or mortgagors, or to give parol evidence of their contents." In Ross vs Gibbs, 8 Equity, c. 524, Sir John Stuart, V. C., says: "It is contended that, unless the agent's communications are with a solicitor, they are not privileged; but that notion is not countenanced by any principle, or by any authority, except a dictum of Lord Brougham, in the case of Greenhough vs Gaskell. The privilege is that of the client, and information procured through an agent relative to litigation, and with a view to it, is as much protected, on principle, as if it were procured through a solicitor. Communications with a professional, or even an unprofessional agent, in anticipation of the litigation, and with a view to the prosecution of a claim to the matter in despute, being confidential, are privileged." In Baker vs The London and South Western Railway Co., 3 Q. B., Law R., 92, Cockburn, C. J., said: "I adhere to the decision in Chartered Bank of India, &c., vs Rich; but the present case is clearly

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distinguishable, because, in that case the documents in question were letters from the one party's own private and confidential agents, who had never placed themselves in communication with other party; and I quite agree that, when confidential communications have taken place between you and your agent, who has been sent to inquire and report about the subject matter of the litigation, you are not, in general, to be compelled to tell your adversary what the result of the inquiries may be." See also Dickson, on Evidence, §§ 1855, 1864, case of Grant vs The Ætna Insurance Co., 11 L. C. R. p. 128 (1). If the information sought from the witness had reference to the res gestæ between the principal and the claimant, and to the contract upon which the action or claim has arisen, the agent should answer. In the present case, I do not think I would be justified in ordering him to produce the papers in question, and the order is refused. (17 J., p. 309)

W. H. KERR, Q. C., for plaintiff. W. W. ROBERTSON, for defendant.

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COURT OF QUEEN'S BENCH, Montreal, 14th October 1873.

Coram Monk, J.

REGINA vs DAVID.

Held:—1. That the Registrar and Treasurer of the late Trinity House of Montreal was a person "employed in the public service of Her Ma-

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2. That an embezzlement by such Registrar and Treasurer of a portion of the fund known as "The Montreal Decayed Pilots' Fund," which, by the Trinity House Act, was declared to be "vested in" the Master, Deputy-Master and Wardens of the Trinity House of Montreal," and to be under their management, was an embezzlement of moneys, "the property of Our Lady the Queen."

The prisoner was indicted for embezzlement. The indictment contained four counts. In the first, the charge was laid as an embezzlement of money received and had in possession by and entrusted to the prisoner, as an *employé* in the public service of the Queen, such money being "the property of Our Lady the Queen." In the second, it was charged that the

⁽¹⁾ Les lettres confidentielles écrites et les rapports faits par l'agent d'une compagnie d'assurance contre l'incendie à son principal, en sa qualité d'agent, après le sinistre, ne peuvent être produits comme preuve contre cette compagnie. (Grant vs. Ætna Insurance Co., Montréal, 31 mars 1860, BADGLEY, J., 11 D. T. B. C., p. 128, et 9 R. J. B. Q., p. 290)

prisoner, as such employé, fraudulently and feloniously, did apply to his own use and benefit a sum of money, "the property of Our Lady the Queen, for and on account of the public service of Our Lady the Queen." In the third, the prisoner was charged with stealing a sum of money, "the property of Our Lady the Queen." And, in the fourth, the charge was that f stealing a sum of money. "the property of the Trinity House of Montreal." The prisoner pleaded not guilty. And, at the trial, it was proved, that the money in question formed part of the fund known as "The Montreal Decayed Pilots' Fund," that the prisoner had charge of that fund, in his official capacity of Registrar and Treasurer of "The Trinity House of Montreal," a corporation created under and by virtue of the statute of the late Province of Canada, 12 Vic., ch. 117, and that the prisoner had been appointed by the Crown, and received his salary from the Crown. On the case for the Crown being closed, the prisoner's counsel submitted that they were not bound to go on their defence, and, in doing so, assigned the following, amongst other, reasons: The fund in question was originally under the control of the Trinity House of Quebec, and, by the Ordinance 2 and 3 Vic., ch. 19, sec 20, was "transferred" to the then Trinity House of Montreal. Whatever remained of the fund thus transferred, and the new fund, created by the 12 Vic., ch. 117, were, by section 24 of that Act, declared to be "vested" in and "under the management of" "the Master, Deputy-Master and Wardens of The Trinity House of Montreal," viz., in the persons composing that corporation, and not in the corporation itself, the French version of the statute stating that such vesting was "dans la personne des dits Maître," &c. It was clear, therefore, that any embezzlement, by the prisoner, of a portion of this fund was neither an embezzlement of moneys the property of Her Majesty, nor an embezzlement of moneys the property of "The Trinity House of Montreal;" the property being really, at the time laid in the indictment, "vested" in the individual members of the Trinity House, as Trustees for "distressed and decayed Pilots, and the widows and children of such Pilots." The Court held, however, that the prisoner, as such Registrar and Treasurer of the Trinity House, was employed in the public service of Her Majesty, and that the fund in question was public money intrusted to the prisoner, as an employé in such public service, and was, therefore, properly laid in the indictment as the property of Her Majesty. The application of the prisoner's counsel was consequently refused. $(17 J_{\odot} p 310)$ T. W. RITCHIE, Q. C., Pro Regina.

Wm. H. Kerr, Q.C., & B. Devlin, for the prisoner.

STRACHAN BETHUNE, Q.C., assisting.

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COUNTY ROADS.-MUNICIPAL LAW.

CIRCUIT COURT, Stanstead, 13th November, 1873.

Coram Sanborn, J.

Ball et al., Appellants, vs The Corporation of the County of Stanstead, Respondents

Held:—1. That the Council of a County cannot, by law, establish a road, part of which is in one, and a part in another, local municipality, in the County, without first declaring, by resolution or by procès-verbal,

such road to be a County road.

2. That any road established by a County must be maintained under the control of such County, and in the Counties of Steanstead, Compton Brome, Missisquoi, Huntingdon, and Richmond, with the exception of certain municipalities mentioned under Art. 1080 of the Municipal Code, must be built and kept up by general assessment upon all the local corporations in the County, in proportion to the total value of their taxable property, except in the case mentioned in Articles 190 and 191, and that an assessment for a County road only upon two, out of a larger number of local corporations in the County, not in accordance with the exception under said Articles 190 and 191, is illegal.

PER CURIAM: This is an appeal from the decision of the Municipal Council of the County of Stanstead, homologating a report of their special Superintendent establishing a road from a place called Judd's Mills, to a place called Rock Island being partly in the local municipality of the township of Stanstead, and partly in that of the Village of Stanstead Plain, both within said County of Stanstead. There are several local municipalities in the County, and this proposed road does not run between local municipalities, but through a portion of each of the local municipalities named. Certain persons resident in the village of Rock Island, and persons resident in the eastern part of the township of Stanstead, and in Barnston, petitioned the council of the County to open this road, to obtain a more easy and direct communication from the eastern part of the County to the village of Rock Island, than through the village of Stanstead Plain. It would seem that the road, if established, would be injurious to the village of Stanstead Plain, and would be no convenience to the majority of the inhabitants of the township of Stanstead. Upon this petition, the Council of the County resolved to send the County Superintendent to report upon the propriety of establishing the road. After the accustomed notices, the special Superintendent reported in favor of opening the road, and made a proces-verbal thereof. On the 6th of May last, the municipal Council of the County, by resolution, homologated the report and proces-verbal. By the proces-verbal, the cost

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of building and keeping in repair said road is imposed upon the local corporations of the Township of Stanstead and the village of Stanstead Plain, in proportion to the length of the road, in each of said municipalities, to be established by repartition. Many objections are unged against this decision of the Council, and I am asked not only to consider the legality of the proceedings of the Council, but exercise discretionary power as to the propriety and justice of establishing the road. It is true that the power given to this Court, in appeal, is unlimited, but, as the Code refers to decisions of the Council, and the appeal is the same as that given from judgments rendered by Magistrates, under the Municipal Code, I think the object of the appeal was mainly to determine whether the Council has acted within its powers and observed the essential formalities required by the Code. I cannot think the Legislature intended to place the Circuit Court above the Municipal Council, in the discretion to be exercised in Municipal legislation on the subjects, from which there is an appeal, but rather to determine when and to what extent their decisions in such subjects are in conformity with the powers conferred By Art. 755 of the Municipal Code, "every municipal road or every part thereof wholly situate in one local municipality, is a local road." "Every municipal road, or every part thereof between two local municipalities lying is a county road." This proposed road coming within the first, and not within the second, definition, is not a County road. By Article 758, the Municipal Council of the County can, by resolution or procès-verbal, declare a local to be a County road. I consider that, before establishing this road, or, by the procesverbal establishing it, the County Council should have declared this to be a County road, and, not having done so, it had no power to homologate the proces-verbal ordering the road to be opened. Again, under Article 1080 of said Municipal Code, all works in the County of Stanstead, as well as in several other counties therein mentioned on municipal roads, are executed, at the expense of the Corporation, in the same manner as if a by-law were passed under Art. 535. In such case, no proces-verbal is necessary, but the works are regulated and determined by the Council which orders the same. See Art. 529. By articles 452, 757, and 785, it will appear that every Council 'whether County or Local', is required to maintain the roads under its control. If this road were established as a County road, it would be incumbent upon the County Council to provide for its maintenance. By articles 491, 760, and 938, it will appear that taxes imposed by a County Council must be levied on all the local corporations of the County, except in the case mentioned in articles 490

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and 491. The exception referred to in these last mentioned articles, as respect a County, confers powers to levy upon a part of the municipality, on a petition by the majority of the rate-payers liable to such tax, and under the conditions set forth in such petitions. In this case, there is no such petition answering the requirements of these sections, and, consequently, the proces-verbal imposing the burden of making and maintaining the road upon two of the local municipalities, when the County comprises several others, is illegal. The law comes to the aid of these local corporations, and appears to me to prevent an injustice, for these two local municipalities, on which the whole burden is laid, are not the most interested in having the road. In fact, to one it is a disparagement, that is, the village of Stanstead Plain. For these reasons, the decision of said County Council in homologating said procèsverbal is reversed and said proces-verbal is declared void. (17 J., p. 312)

TERRILL & TERRILL, for appellants.

E. R. Johnson, counsel.

H. M. HOVEY, for respondents.

EXCEPTION TO THE FORM.

SUPERIOR COURT, Montreal, 27th May, 1873.

Coram Johnson, J.

Thos. S. Brown, ès-qualité, vs The Imperial Fire Insurance Company.

Held:-1. Than an Exception à la forme can be fyled to an amended declaration.

That such Exception was not waived by subsequent pleas to merits of amended declaration.

The action was on two policies of insurance. Defendants, in the first instance, pleaded to the merits. After fyling of plea, plaintiff moved to amend his declaration, which was granted by the Court (MACKAY, J.) with liberty to defendants, within eight days, to amend their pleas, or plead de novo, if they thought fit. Within the four days from the amendment, defendants fyled an exception à la forme to the amended declaration, on the ground that it was ambiguous and unintelligible, and, within eight days, fyled supplementary pleas to the merits, with special reserve of the exception à la forme.

ROBERTSON W., thereupon, moved, on behalf of plaintiff, to reject the exception à la forme, because: 1st, no suci. excep-

tion lay to the amended declaration, the same not being fyled within the four days from the return of the action, and the interlocutory judgment permitting the amendment only allowing defendants to plead de novo, pleas of a similar nature to those already fyled by them, i. e., pleas to the merits. 2ndly because defendants, by fyling supplementary pleas to the merits of amended declaration, had waived their preliminary pleas, and cited a decision under the Lessor and Lessee's Act, holding that pleading to the merits waived preliminary pleas.

CRAMP, G. B., for defendants, argued that, in the present instance, there was no waiver of the exception, because defendants were under compulsion, by the terms of the judgment allowing the amendment, to fyle all their pleas within eight days: and that defendants have specially reserved their exception and could not be held to have waived it. He cited Attorney General vs Gray et al., 15 L. C. Jurist, p. 255, and 22 R. J. R. Q., p. 555, Pigeau, Procedure, vol. I, p. 201.

Per Curiam: It is not necessary to enter into any details in this case. It is enough to state that the exception à la forme is pleaded altogether to the amended declaration, and is founded upon the vagueness and insufficiency of its allegations. This takes the matter out of the ordinary rule, and the motion must be dismissed. Motion dismissed. (17 J., p. 323; 20 J., p. 179)

A. & W. ROBERTSON, for plaintiff. G. B. CRAMP, for defendants.

TRIAL BY JURY.

COURT OF QUEEN'S BENCH, Montreal, 14 December, 1875.

Coram Dorion, Ch. J., Monk, J., Ramsay, J., Sanborn, J.

Brown, Appellant, and The Imperial Fire Insurance Co., Respondent.

Held:—That the service, within four days after issue joined on amended pleadings, of a notice of motion praying acte of the option of the mover to have a trial by jury and the making of such motion subsequently, are a sufficient compliance with the requirements of Art. 350 of the Code of C. P.

This was an appeal from two interlocutory judgments of the Superior Court, at Montreal, one of them rendered 20th June, 1873 (BEAUDRY, J.), and the other, on the 18th September 1874 (BERTHELOT, J.). The former judgment dis-

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lgments endered he 18th ent dismissed the motion made by plaintiff; "that, inasmuch as " plaintiff has, in due course of law, declared his option for "a trial by jury, that the inscription for enquête made by "defendant be declared to be irregular, and that it be held " and ordered that plaintiff is not obliged to proceed with his " enquête under said inscription, but may, in due course, pro-"ceed to trial by jury, as he hath elected in this cause, the "whole with costs." The latter judgment rejected plaintiff's motion for acte " of the declaration hereby made of his option " for the trial by jury, and that it be declared that plaintiff is "entitled to such trial." The option referred to in the first motion had been made in plaintiff's answers to defendant's pleas, and the latter was contained in a motion presented to the Court, on the 17th of September, 1874, of which notice had been previously given on the 9th of that month. The plaintiff had, with the permission of the Court, amended his declaration, and defendant filed his pleas to the declaration as amended on the 25th October, 1873, and plaintiff having failed to answer these pleas, defendant inscribed the case for enquête on the 27th may, 1874. On the 9th July, 1874, plaintiff was allowed by the Court to file answers to said pleas, and, on the 8th September, 1874, defendant filed a replication to these answers.

Dorion, Ch. J.: The question raised by this appeal is twofold in character. Can the option to have the case tried by a jury be made in the answers to pleas, and was the option contained in the notice of motion a sufficient compliance with the terms of the article of the Code? There seems to be no reason why the option for a jury trial could not be made by plaintiff in his answers to the defendant's pleas, yet, art. 350 says it is done by the declaration, or in the pleas, or by special application. We are not, however, required to decide that question in this case, as we are all agreed that the issue was only joined on the 8th September, 1874, and, consequently, that the option declared in the notice of motion for the nearest day in Term (the 17th) which was served within four days after issue joined, namely, on the 9th of September, was a complete compliance with the requirements of the article of We are under the necessity, therefore, of reversing the judgment which dismissed plaintiff's motion.

"The Court, considering that appellant, plaintiff in the Court below, has, by his answer to respondent's pleas, before issue joined, and also by motion made on the 17th of September, 1874, of which motion notice was given within four days after issue joined, declared his option to have said issue tried by a jury; And, considering that this case is one susceptible of a trial by jury, under article 348 of the Code of Procedure,

that acte should have been granted of his declaration, as prayed for by his motion of the 17th of September, 1874; And, considering that there is error in the judgment rendered by the Superior Court, on the 18th day of September, 1874, rejecting said motion, this Court doth quash and annul the judgment of the 18th of September, 1874; and, proceeding to render the judgment which the Court should have rendered, doth adjudge and declare that appellant is entitled to a trib by jury and doth grant acte to appellant of the declaration made by his motion of his option to have this cause tried by a jury, and doth condemn respondents to pay the costs on the present appeal." (20 J., p. 179)

A. & W. ROBERTSON, for appellant. G. B. CRAMP, for respondent.

CASSATION DE MARIAGE POUR IMPUISSANCE,

COUR PROVINCIALE D'APPEL, Québec, 15 janvier 1848.

Coram Str James Stuart, J. C., Bowen, J., Stewart, J., Heney, J., et Bedard, J.

MARIE HÉLÈNE DORION, appellante, et ALBERT LAURENT, intimé.

Jugé:—Que si la preuve de l'impuissance est ir complète, l'époux poursuivi devra se soumettre à l'examen de médecins experts, et qu'à son refus de le faire les causes invoquées dans l'action seront considérées pro confessis et le mariage cassé.

La déclaration, après avoir allégué qu'à l'époque du contrat et de la célébration du mariage, intervenu entre la demanderesse et le défendeur, le 13 octobre 1841, le défendeur était et est encore dans un état complet d'impuissance, conclut " à ce que le contrat de mariage n'étant qu'un fait sans exister en droit, soit déclaré et adjugé, par la sentence de cette Cour (savoir la Cour du Banc du Roi) nul et d'aucun effet civil, et ne pouvant lier ou obliger en aucune manière quelconque Marie H. Dorion, laquelle se réserve son recours pour tous autres droits, actions et prétentions qu'elle justifiera en temps et lieu lui appartenir. Le défendeur ayant fait défaut, la demanderesse fit sa preuve ex parte, et inscrivit sa cause pour jugement. Le 20 avril, 1842, la Cour du Banc du Roi (Pyke, Rolland et Gale, JJ. siégeant) débouta l'action, sans assigner aucun motif, mais évidemment pour la raison que la preuve était insuffisante. La cause ayant été portée devant la

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ie du contre la de-Héfendeur ce, conclut ns exister ette Cour t civil, et gelconque pour tous ifiera en it défaut, sa cause n**c** du Roi tion, sans on que la devant la Cour Provinciale d'Appel, le jugement suivant intervint, le 17 janvier 1843: "It is considered and adjudged by the Court now here that the judgment of the Court of King's Bench, for the District of Montreal, rendered on the 20th day of April, 1842, be and the same is hereby reversed, with costs. And this Court proceeding to give such judgment in the premises as by the Court below ought to have been rendered, it is further considered and adjudged, that, before final adjudication, Albert Laurent, the respondent, do submit to the inspection of two surgeons, to be named by the parties respectively, and, in default of such nomination, to be appointed by the Court below, and to be duly sworn in this behalf at such time and place as by the said surgeons may be designated and fixed, for that purpose, in order to enable the said surgeons to ascertain, by the inspection of the person of Albert Laurent, and to report to the Court below. whether Laurent labour under any physical mal-conformation or defect, which has rendered him incompetent to consummate his marriage with Marie Hélène Dorion; and that the said surgeons, to be named and appointed as aforesaid. do report their opinion in the premises to the Court below. without any unnecessary delay." Le 20 février 1843, la Cour du Banc du Roi (Vallières de Saint-Réal, J. C., Rolland, Gale et Day, JJ. siégeant) émit un ordre, enjoignant au défendeur. dans les termes du jugement de la Cour d'appel, "do submit to the inspection of two surgeons to be named, &c." Le défendeur, assigné à domicile, et non en personne, fit défaut sur cette règle. Le six avril 1843, les Drs. Wolfred Nelson et B. H. Charlebois furent nommés médecins-experts, et, le 12 du même mois, ils signifièrent avis au défendeur d'avoir à comparaître devant eux à l'effet de subir l'examen en question. Le 1er juin 1843, les médecins firent rapport que le défendeur ayant défailli à comparaître devant eux, un avis fut publié dans la Minerve, du 12 avril au 27 mai, le sommant de comparaître devant eux, ce qu'il n'avait pas fait. Le 19 février 1844, la Cour du Banc du Roi (Vallières de Saint-Réal, J. C., Rolland, Gale et Day, JJ. siégeant), rendit le jugement final qui suit: "La Cour, ayant entendu l'avocat de la demanderesse au mérite, et vu les défauts obtenus par elle contre le défendeur, faute de comparution de sa part, vu aussi la procédure et les preuves, et, nommément, le jugement de la Cour Provinciale d'Appel, rendu entre les parties, le dix-sept de janvier 1843, signifié au défendeur par Génand, huissier de cette Cour, le trente et un de janvier dernier; vu aussi la sommation et avenir donnés au défendeur, en exécution du dit jugement, par Wolfred Nelson et Basile H. Charlebois, médecins et chirurgiens dûment nommés aux fins du dit jugement, laquelle sommation et avenir a été signifiée au défendeur, par Génand, huissier, le huit du présent mois de février, vu enfin le rapport fait à cette Cour le quatorze du présent mois de février, en obéissance au dit jugement de la Cour Provinciale d'Appel, et duquel rapport il résulte et appert que le défendeur ne s'est pas présenté, et n'a pas comparu devant Nelson et Charlebois, en obéissance au dit jugement, aux temps et lieu indiqués par les dits sommation et avenir à lui signifiés comme susdit, et, après en avoir délibéré, adjuge et déclare que le prétendu mariage entre la demanderesse, Marie Hélène Dorion, et le défendeur, Albert Laurent, est absolument nul, à toutes fins que de droit, condamne le défendeur à payer à la demanderesse des dommages et intérêts suivant la liquidation qui en sera faite, et, de plus, les dépens de la présente action." (17 J., p. 324)

HENRY STUART, avocat de la demanderesse.

CENS ET RENTES .- PRIVILEGE.

SUPERIOR COURT, Montreal, 29th November, 1873.

Coram TORRANCE, J.

LANTIER & et al. vs McDonald, and Les Héritiers De Beaujeu, Collocated, and Lantier et al., Contesting.

Hild:—That the hypothecary rights of the seignior for arrears of his rent (cens et rentes) are limited to 5 years and the current year under C. C. 2012, subsequent to the deposit of the cadastre under Cons. St. L. Can., Cap. 41, and to 29 years for anterior arrears.

PER CURIAM: The sheriff made a return of \$283.45 levied of defendant's lands. The prothonotary has prepared a report of distribution by which the heirs De Beaujeu are collocated in the following terms: "To the heirs De Beaujeu: Seeing by the title deed of donation from Flora Macdonald, widow of John Macdonald, and Helena Macdonal to defendant, executed before G. H. Dumesnil, Notary, on the 11th January, 1862, and registered on the 17th of same month, and mentioned in the registrar's certificate, that the said gift or donation of said lot no 17 (the proceeds whereof are now being distributed) was made at the express charge by the donee, 1. to pay, as well for the past as for the future, all seigniorial cens et rentes, and 2. to pay to the creditors of the donors and John Macdonald, on first demand, all and every lawful claims they may have against the donors and the late John Macdonald, part of their claim for arrears of seigniorial

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.45 levied repared a aujeu are Beaujeu: [acdonald, to defenthe 11th e month, said gift are now re by the future, all ors of the nd every d the late eigniorial rights and interest accrued, and costs of suit incurred for the recovery thereof, up to the 8th April, 1864, date of the deposit of the seigniorial cadastre, deducting therefrom the difference, to wit, \$37.57, between costs and interest charged in the account and the divers sums paid on account, to wit, \$102.61, five years and the current year's interest on \$35.74, (or 1 of item of £17 17 5 charged in the account) from 28 July to 8 April \$17.98, 5 years and the current year's cens et rentes from 8 April to 8 April, \$10.68. Total: \$131.27. The plaintiffs contest the collocation, alleging that it is without foundation for more than £2 8s 0d, being at the rate of 8s 10d. per annum, from 11th Nov., 1867, to 8th April, 1873, date of the decret; that the judgment mentioned in the account of the heirs De Beaujeu is prescribed by more than 30 years, and, if it were not prescribed, has never hypothecarily affected the immoveable sold in this cause; that, by the Seigniorial Act, 1854 (18 Vic. ch. 3), in the Consol. Stat. Lower Canada, cap. 41, ss. 30, 33, it was enacted that, from the publication, in the Canada Gazette, of the notice that the cadastre of a seigniory had been deposited in the office of the Prothonotary of the Superior Court, each censitaire of such seigniory should possess his land, en franc aleu roturier, free and clear of all seigniorial rights; and, by s. 50 of the said Act, reproduced in C. C. 2012, it was enacted that the creditor of such rent could not recover more than 5 years of such rente constituée, without the registration of a memorial of arrears, as provided by C. C. 2125. The creditors collocated answered that their claim was not prescribed; that the prescription had been often interrupted by payments, and by acknowledgments, particularly, by a gift, 11th January, 1862, by which Flora Macdonald gave defendant the property in question, at the charge of paying claimants all that might be due to them; that this acte was duly registered; that, subsidiarily, they had a right to claim 29 years of arrears of cens et rentes before the deposit of the cadastre, less the number of years expired since the deposit of the cadastre, and, adding 5 years since the deposit of the cadastre, and the current year, which would make, in any case, \$46.18, which the creditors collocated would have a right to claim, supposing that the claim based upon the judgment and the donation were prescribed: After an examination of the case, the Court is of opinion that the judgment and donation do not help the creditors collocated. The judgment was not registered, and the donation does not specify the amount of arrears under consideration as being a debt payable by the donee. But Mr. Laflamme, for the creditors De Beaujeu, contends that, until the deposit of the cadastre in the office TOME XXIII.

of the Prothonotary, he had a right to 29 years of arrears; that, at the date of the collocation, at least 20 years of these arrears were unprescribed, and that he had, in addition, a right, since the deposit of the cadastre, to 5 years and the current year. Mr. Doutre, for plaintiffs, by his contestation, would make the 5 years rule of the statute and of the C. C. 2012 retroactive. The Court is against this pretension. The Court is of opinion to grant the subsidiary conclusions of De Beaujeu's answer, which would maintain the collocation to the extent of \$45.97. The collocation will be reformed accordingly. (17 J., p. 327)
J. DOUTRE, Q. C., for plaintiffs.

L. LAFLAMME, for De Beaujeu.

EXCEPTION TO THE PORM .- AMENDMENT.

Superior Court. Montreal, 17th December, 1872.

Coram MACKAY, J.

CLEMOW et al. vs McLaren et al.

Held:—That it is not competent to a plaintiff to move, at the final hearing on the merits of an exception à la forme, to amend his writ and declaration.

This was a motion to amend plaintiff's writ and declaration, by striking out the word "James" wherever it occurred in the name of the firm referred to therein, and substituting therefor the letter "J." The motion was rejected, the Court assigning the following reasons: "It is ordered, that plaintiffs do take nothing by their said motion, as coming too late, at the end of the cause." Motion to amend rejected. (17 J., p. 328)

PERKINS & MONK, for plaintiffs. HON. J. J. C. Arbott, Q. C., for defendants. LACE

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CARRIER.-DEMURRAGE.

SUPERIOR COURT, Montreal, 9th July, 1873.

Coram TORRANCE, J.

LACROIX vs JACKSON.

Held:—That the prevalence of a disease among horses, such as that of October, 1872, which rendered large numbers for the time unserviceable, is no defence to a claim by a vessel against the consignee for demurrage for delay in discharging the cargo.

PER CURIAM: The action is one of damages against the consignee of a cargo of coal, for demurrage, for detention of plaintiff's barge. He claims \$240 for 12 days. Defendant pleads that any delay was caused by plaintiff's own fault, and by the horse disease making it impossible to get horses to remove the coal. Plaintiff has not proved that he was detained 12 days, and he appears to have been guilty of neglect in not taking the place assigned him by the harbour master. The existence of the horse disease is proved, but do not consider it a cas fortuit or force majeure. It may have been difficult to get horses, but there is no doubt they could be got if he would pay enough. On the whole, I think defendant is answerable for 5 days delay, and judgment will go for \$100 and costs. (17 J., p. 329)

T. & C. C. DELORIMIER, for plaintiff.

J. A. PERKINS, for defendants.

DROITS SEIGNEURIAUX .- COMMUTATION .- USUPRUITIER.

COUR SUPÉRIEURE, Montréal, 29 novembre 1873.

Coram BEAUDRY, J.

LE SÉMINAIRE DE ST-SULPICE vs LOUIS B. DUROCHER.

Jugé:—Que le simple usufruitier d'un immeuble situé dans la censive de la szigneurie de Montréal a le droit de demander au Séminaire de Montréal la commutation des droits seigneuriaux.

PER CURIAM: Cette action est portée hypothécairement contre le défendeur, pour le recouvrement du prix de la commutation de tenure des deux immeubles dont le défendeur a acquis neuf-quarantièmes indivis, \$666.50, avec intérêt du jour de l'assignation et les dépens. Le défendeur a plaidé, que

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la réclamatien n'a pas été faite suivant la loi : qu'Alfred Turgeon, à qui la commutation a été accordée, n'étant qu'un usufruitier, n'avait pas qualité pour demander la commutation desdits immeubles, non plus que les hypothéquer. Le défendeur ajoutait, qu'il avait offert et offrait de payer ses arrérages de cens et rentes, dix centins d'intérêt sur icelle, et \$4.85, pour frais, somme qu'il a consignée. J'observe que le demandeur ne fait pas voir qu'il ait droit aux frais du renouvellement d'enregistrement, savoir, à la somme de \$4.50, et sur ce point le défendeur paraît bien fondé, mais la question de la validité de la commutation est plus importante. Pour bien juger cette question, il est besoin de se reporter en arrière et d'étudier la législation sur la commutation. Pour peu qu'on connaisse ce qui s'est passé, on ne saurait ignorer que, depuis longtemps, le gouvernement avait fait des efforts pour faire disparaître la tenure féodale, et la tenure seigneuriale, et le grand obstacle était l'indemnité à accorder aux seigneurs. Pour ce qui regarde les seigneuries du Séminaire de St-Sulpice, on profita de la demande qu'il faisait d'un acte législatif, reconnaissant et son établissement, et son existence, et ses droits, pour lei imposer des conditions onéreuses, pour dire le moins. Parmi ses conditions, on introduisit l'obligation d'accorder, sur la demande "d'aucun qui ont maintenant (dit "l'ord. 3 Vic., ch. 30, sec. 4) ou qui pourront, à l'avenir, " posséder aucun bien-immeuble, à titre de cens ou en roture, " une commutation, décharge et estimation de lods et ventes, "cens et rentes, et de toutes autres charges féodales et sei-" gneuriales quelconques, auxquels tel censitaire, personne ou " corporation qui possèdent tels immeubles...sont sujets." La section neuvième autorise le censitaire, ou autre personne qui a droit à la commutation, de poursuivre en justice, pour obtenir du Séminaire l'acte de commutation requis. La commutation n'était ainsi que facultative pour le censitaire, par cette ordonnance; mais, par le statut 22 Vic., ch. 48, sec. 12, il fut déclaré que "dans les parties des seigneuries appartenant au " dit Séminaire, qui se trouvent dans les limites de la cité et " paroisse de Montréal, les lods et ventes et autres droits " casuels seront censés avoir été abolis le quatre mai 1849, et " en lieu d'iceux, un droit de commutation, à être calculé et "constaté en la manière prescrite par l'ordonnance sera " payable au Séminaire à la première mutation de proprié-" taire d'un immeuble quelconque, et ce droit de commutation " sera garanti et payé, sous les mêmes privilèges, et recou-" vrable de la même manière que le sont actuellement les lods " et ventes et autres droits casuels auxquels il est substitué; " mais, dans le cas de succession ou de legs, ce droit de com-" mutation ne sera exigible, par le Séminaire, qu'à l'expiration

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" de dix années après le décès de la personne de laquelle pro-"cède l'immeuble." En 1860, date de la commutation accordée à Turgeon, cette commutation était donc acquise de plein droit : il ne restait qu'à fixer l'indemnité payable au seigneur, et, d'après les termes de l'ordonnance, toute personne en possession de l'immeuble pouvait exiger la commutation, et un acte pour la constater. L'usufruitier était bien en possession : il avait, aussi bien que le nu-propriétaire, intérêt à obtenir la commutation, surtout, lorsque cette commutation était virtuellement et expressément décrétée et déclarée opérée par la loi. La seule formalité à remplir était l'évaluation de l'immeuble et la fixation de l'indemnité. Cette évaluation a été faite avec la personne en possession, aux termes de l'ordonnence, et le défendeur se garde bien d'alléguer que cette évaluation est excessive, ou entachée de dol ou de fraude. La commutation me paraît conséquemment parfaitement régulière. Mais, en supposant, pour un instant, que le nu-propriétaire, aurait dû être appelé, et que l'acte en question ne serait pas valable, ce que repousse l'argumentation qui précède, le défendeur ne pourrait certainement pas prétendre que la commutation n'a pas eu lieu: l'indemnité en était certainement due, dès le quatre de mai 1859, et cette indemnité était réglée par l'ordonnance, suivant la valeur de l'immeuble. L'acte produit constate que cette valeur était de \$6.000, c'est là un fait que le défendeur était tenu de contester : c'est ce qu'il n'a pas fait, et je ne vois pas lieu de le révoquer en doute.

"La Cour, considérant que la présente action est une action hypothécaire, dans le but de recouvrer le montant du prix de la commutation de tenure des immeubles ci-après décrits, et situés dans l'enclos de la seigneurie de Montréal, appartenant aux demandeurs, et que les demandeurs ont accordé ladite commutation à Joseph Octave Alfred Turgeon, en sa qualité d'usufruitier desdits immeubles, par acte reçu à Montréal, devant P. Lacombe, notaire, le dix juillet, 1860; considérant que le défendeur, détenteur actuel de neuf-quarantièmes desdits immeubles, a opposé à cette action que Turgeon, en sa qualité d'usufruitier, n'avait pas qualité pour obtenir la commutation, et grever les immeubles du prix de telle commutation; considérant, en droit, que l'abolition de la tenure seigneuriale a été décrétée comme nature d'intérêt général, et que l'ordonnance des trois et quatre Victoria, chapitre trente, qui reconnaît les droits des demandeurs, comme seigneurs de la Seigneurie de Montréal, leur impose l'obligition, chaque fois qu'ils en seront requis par aucun des censitaires, ou autre personne, qui ont maintenant, ou qui pourrait, à l'avenir, posséder aucun bien immeuble, à titre de

cens, ou en rotûre, d'accorder à telles personnes une commutation de charge et extinction des droits de lods et ventes, cens et rentes, et de toutes autres charges féodales et seigneuriales quelconques, dont tels immeubles peuvent être grevés, movennant un certain prix et indemnité convenu et arrêté, en la manière prescrite en la dite ordonnance; considérant, de plus, que, par le Statut Provincial du Canada, passé en la vingt-deuxième année du règne de Sa Majesté, chapitre quarante-huit, il est statué que, dans les parties des seigneuries appartenant aux demandeurs, qui se trouvent dans les limites de la cité et paroisse de Montréal, les lods et ventes, et autres droits casuels, seront censés avoir été abolis le quatre mai 1859, et, en lieu d'iceux, un droit de commutation, à être calculé et constaté en la manière prescrite par le chapitre quarante-deux des Statuts Refondus pour le Bas-Canada, sera payable à la première mutation de propriétaire d'un immeuble quelconque, que cette mutation ait lieu par vente, échange, héritage ou legs, ou de toute autre manière, et ce droit de commutation sera garanti et payé sous les mêmes privilèges, et recouvrable de la même manière que les lods et ventes et autres droits auxquels il est substitué; considérant qu'à l'époque où le dit acte, entre les demandeurs et Turgeon, a été passé, l'abolition des droits seigneuriaux sur lesdits immeubles était acquise, et qu'il ne restait plus qu'à calculer et constater le droit de commutation payable sur lesdits immeubles, et que les demandeurs étaient tenus, sur la demande de Turgeon, de procéder à ladite constatation, et que les propriétaires de la nue-propriété ne sauraient contester ce droit de commutation, à moins d'établir qu'il y avait eu erreur, dol ou lésion dans cette constatation, et qu'en conséquence, l'exception ou moyen invoqué par le défendeur est mal fondé; considérant, en conséquence, que les offres et consignation du défendeur, sont insuffisantes : Déboute le plaidover du défendeur, et procédant à adjuger sur la demande des demandeurs, la Cour déclare les immeubles mentionnés en la déclaration des demandeurs comme suit, savoir : (désignation des immeubles), et spécialement la part du défendeur dans iceux, savoir: les neuf quarantièmes indivis, affectés et hypothéqués au paiement de la somme de \$380, montant de la commutation ci-dessus mentionnée, et de celle de \$258.80, montant des intérêts calculés jusqu'au huit septembre 1873, ainsi que de la somme de neuf piastres, pour cens et rentes dus sur les dits immeubles jusqu'au onze novembre 1859, formant un total de \$647.80, avec intérêt sur icelui, du onze septembre 1873, jour de l'assignation et les dépens, condamne, en conséquence, le défendeur à délaisser en justice les dits neuf quarantièmes des susdits immeubles, pour être vendus en jus

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tice suivant les formalités de la loi, et sur le prix, les demandeurs être payés de leur créance susdite, si mieux n'aime le défendeur payer aux demandeurs le montant de leur susdite créance en principal, intérêt et dépens, ce que le défendeur sera tenu d'opter sous quinze jours de la signification du présent jugement, et, à défeut par le dit défendeur, de faire cette option dans le susdit délai, sera le défendeur tenu personnellement au paiement de la dite somme de \$647.80, avec intérêt, tel que susdit, et les dépens, la Cour renvoyant le surplus de la demande, quant aux frais d'enregistrement. (17 $J_{\cdot \cdot}$, p. 330.)

DEBELLEFEUILLE & TURGEON, avocats du demandeur.

JETTÉ & BÉIQUE, avocats du défendeur.

PROTONOTAIRE DE LA COUR SUPERIEURE.

Cour de revision, Québec, 31 octobre 1873.

Coram Meredith, C. J., Stuart, J., et Caseault, J.

NARCISSE TRAHAM vs CHARLES GAGNON et LUDGER GAGNON, défendeurs, et LUDGER GAGNON, opposant à jugement.

Jugé:—Que les protonotaires conjoints ont le droit de recevoir un affidavit, pour faire preuve dans un autre district, de même que si cet affidavit avait été reçu devant un des juges de la Cour Supérieure.

Ludger Gagnon avait formé une opposition au jugement, rendu ex parte contre lui le 14 décembre 1872, par la Cour Supérieure, aux Trois-Rivières. Il demeurait dans la paroisse de Ste-Clotilde de Horton, dans le district d'Arthabaska. Comme il était plus près des protonotaires du district d'Arthabaska que de celui des Trois-Rivières, il se présenta devant eux, pour assermenter son affidavit au soutien de son opposition, et ils recurent son serment. Le jurat est comme suit: "Assermenté devant moi, au village d'Arthabaskaville, ce 24 mars 1873. Barwis et Théroux, P. C. S." Le demandeur fit motion, fondée sur l'art. 486 du Code de Procédure, pour faire rejeter l'opposition. Le 18 juin, 1873, M. le juge Loranger, qui présidait alors la Cour Supérieure, aux Trois-Rivières, rendit le jugement suivant: "Considérant que Barwis et Théroux, en leur qualité de protonotaires conjoints de la Cour Supérieure n'ont pas de juridiction, pour faire prêter serment dans les causes pendantes devant la dite Cour, au ressort de la dite Cour, dans le district des Trois-Rivières, attendu qu'ils ne sont protonotaires conjoints que dans et pour le district d'Arthabaska, et que la déposition au bas de la dite opposition

comporte avoir été assermentée devant Barwis et Théroux, protonotaires de la dite Cour, dans le district d'Arthabaska, et que, conséquemment, la dite opposition n'est pas revêtue des formalités voulues par la loi en autant qu'elle n'est pas accompagnée de la déposition requise par l'article 486 du Code de Procédure Civile, déboute Gagnon de son opposition à jugement enregistré contre lui par le protonotaire de cette Cour, le 14 décembre 1872, lequel sera exécuté dans sa forme et teneur, et le condamne aux dépens de la dite opposition." La Cour Supérieure, en Révision, infirma ce jugement, pour les raisons suivantes: "Considering that the power of Barwis and Théroux as Prothonotary of the District of Arthabaska, to receive affidavits is not derived from their commission, but is exercised by them under the article 30 of the Code of Procedure, which sets forth that "Every judge, " prothonotary and clerk, and every commissioner authorized "for that purpose as hereinafter mentioned, has a right to "administer and receive the oath, whenever it is required "by law, by rules of practice, or by order of a Court or "Judge, or the affirmation in the cases which admit of it, "unless such right be restricted by some provision of law." And, considering that the power so given to the several Prothonotaries of this Court, is not restricted by any provision of law to the receiving of affidavits in cases pending in the different branches of the said Court for which the said Prothonotaries are respectively appointed, and, on the contrary, that every Prothonotary of the said Court has under the said article, the same powers as a judge, or a commissioner, in so far as regards the receiving of affidavits to be used in the Superior Court, or the Circuit Court: and, considering that, as the judgment of which Gagnon complains was rendered by the Prothonotary in vacation, defendant, under article 484 of the Code of Procedure, has, if the allegations contained in his opposition be true, properly sought to be relieved from the said judgment, by means of an opposition: doth, for the reasons aforesaid, set aside the judgment rendered on the 18th June, 1873." (17 J., p. 333.)

P. A. BOUDREAULT, plaintiff's attorney, E. L. Pacaud, opposants' attorney.

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SOCIETE COMMERCIALE.

COUR DE CIRCUIT, Murray Bay, 9 décembre 1873.

Coram TASCHEREAU, H. E., J.

COUTURIER vs BRAS. ARD et al.

Jugé:—Qu'une société entre un shérif, un avocat et un marchand, pour l'exploitation d'un moulin à scie, est une société commerciale.

TASCHEREAU, H. E., J.: Les défendeurs, un shérif, un avocat et un marchand, sont propriétaires d'un moulin à scie, pour l'exploitation duquel ils ont fait un acte de société le 26 juillet 1872. Leurs opérations consistent uniquement à scier les billots qu'on apporte à leur moulin, et à les convertir en planches ou madriers, à tant par pied. Comme de raison, ils ne font pas cela eux-mêmes, mais par des journaliers qu'ils engagent. Le demandeur réclame soixante et trois piastres, pour ouvrages faits à ce moulin, et demande contre les défendeurs une condamnation solideire. Les défendeurs nient être sujets à cette solidarité, et prétendent que la société entre eux est une simple société civile. Je suis d'avis que cette prétention n'est pas fondée, et que leur société est une société commerciale. L'article 1863 du Code Civil dit: "Les sociétés commerciales sont celles qui sont contractées pour quelque trafic, fabrication, ou autre affaire d'une nature commerciale, soit qu'elle soit générale, ou limitée à une branche ou aventure spéciale." Or, les défendeurs se sont associés pourquoi? Pour la fabrication de planches et madriers. Il ne peuvent prétendre que cette fabrication est accessoire à leurs occupations ordinaires. Il n'achètent rien pour revendre, il est vrai, mais ils louent leurs employés, pour en sous-lorr ou revendre les services à ceux qui apportent à leur moulin des billots pour les faire scier, et ce dans un but de spéculation. Les autorités françaises soumettent les opérations semblables à la juridiction de leurs tribunaux de commerce. "On ne pourrait refuser " de réputer commerciale l'opération d'un entrepreneur de " filature qui convertirait en fils la laine ou le coton qu'on lui "confierait dans cette vue. Il en serait de même d'un établis-" sement de foulon, de blanchisseurs, qui reçoivent les étoffes " ou les toiles de ceux qui les leur confient pour les préparer "ou les blanchir." (Pardessus, Droit Commercial, n° 35.) On voit au Journal du palais, 1847, un arrêt de la Cour de Paris, du 9 avril 1847, qui a jugé qu'une société formée pour la construction d'une villa sanitaire, destinée à recevoir des malades qui doivent y être traités par le magnétisme, est une société

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commerciale. La preuve du demandeur est complète, par les admissions de Brassard, l'un des défendeurs, entendu comme témoin: un associé lie ses co-associés par ses admissions. Les causes de Maguire vs Scott et de Fisher vs Russell, (1) DAY, J., ont depuis longtemps établi cette jurisprudence. Jugement contre les défendeurs, conjointement et solidairement. (18 J.,

J. PERRAULT, pour le demandeur. F. X. Frenette, pour les défendeurs.

MINEUR.—OBLIGATION.

Cour de Circuit, Murray Bay, 7 juin 1873.

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Coram H. E. TASCHEREAU, J.

MILLER vs DEMEULE.

Jugé:-Que c'est au demandeur qui veut recouvrer de l'argent prêté à un mineur à prouver l'emploi utile de l'argent.

TASCHEREAU, H. E., J.: Le demandeur allègue, par sa déclaration, que, par acte d'obligation, passé le 8 mai 1863, le défendeur reconnut lui devoir la somme de £22. 10, pour autant prêté dès avant la passation du dit acte, et c'est cette somme, avec les intérêts depuis 1863, qu'il réclame du défendeur, par la présente action. Le défendeur dit: " le 8 mai "1863, lorsque j'ai consenti cette obligation, j'étais mineur; "j'ai été lésé en consentant cette obligation; je n'ai jamais " touché aucune partie de l'argent porté au dit acte ; je n'étais " pas assisté au dit acte tel que voulu par la loi; en consé-" quence, je demande à être relevé de la dite obligation, et à " ce que le dit acte soit déclaré nul, et l'action renvoyée, avec dépens." Le défendeur a établi qu'il était mineur, le 8 mai 1863, lors du dit acte d'obligation, mais n'a pas fait d'autre preuve. Le demandeur n'a fait aucune preuve. Le demandeur

⁽¹⁾ Dans une action intentée contre une société en recouvrement du prix de marchaudises vendues à l'un des associés, pour l'usage de la société, les réponses sur faits et articles de l'associé ayant fait l'achat, que lesdites marchandises ont été employées au profit de la société, non seulement sont admis-sibles, mais tont preuve complète contre la société. (Maguire et Scott, C.B.R., sibles, mais jont preuve complete contre la societé. (Majure et Scott, C.B.C., en appel, Québec, 16 décembre 1857, LAFONTAINE, J. en C., AYLWIN, J., DUVAL, J., et CARON, J., dissident, confirmant le jugement de C. S., Québec, 15 décembre 1856, 7 D. T. B. C., p. 451.)

Les admissions d'un associé, en réponse à des interrogatoires sur faits et articles, après la dissolution de la société, lient les autres membres de la société, (Fisher vs Russell et al., C. S., Montréal, 27 février 1858, Day, J., 2 J., 2 L., 2 C. 472.

p. 191, et 6 R. J. R. Q., 472.).

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nent du prix société, les esdites marsont admiscott, C.B.R., AYLWIN, J., S., Québec,

s sur faits et bres de la so-DAY, J., 2 J.,

dit: "Le défendeur a plaidé lésion, c'était à lui à la prouver: " le fait seul qu'il était mineur, lorsqu'il a consenti cette obli-"gation en ma faveur, n'est pas suffisant pour renvoyer l'ac-"tion: l'obligation consentie par un mineur n'est pas nulle " de plein droit : le mineur ne peut être restitué que s'il a été "lésé: minor restituitur non tanquam minor, sed tan-" quam læsus; or, le défendeur n'ayant pas prouvé qu'il a été "lésé, je dois avoir jugement contre lui." A cela le défendeur répond: "Je n'avais pas à prouver lésion; la loi " la présume en ma faveur: c'était au demandeur à prou-" ver que cet argent m'a profité, et a tourné à mon avan-" tage, et, n'ayant pas fait cette preuve, il ne peut recouvrer " de moi cette somme, et son action doit être renvoyée." C'est là, la cause telle que soumise à la cour. Voyons quels sont les articles de notre code qui se rattachent à la question. Le premier est l'article 290: "Le tuteur prend soin de la per-"sonne du mineur et le représente dans tous les actes civils." Le second est l'article 984: "Quatre choses sont nécessaires pour la validité d'un contrat : des parties ayant la capacité " légale de contracter; leur consentement donné légalement; " quelque chose qui soit l'objet du contrat; une cause ou con-"sidération licite." Le troisième est l'article 985: "Toute " personne est capable de contracter, si elle n'en est pas expres-"sément déclarée incapable par la loi." Et l'article 986: "Sont incapables de contracter : les mineurs, dans les cas et sui-" vant les dispositions contenues dans ce code." L'article 1002 dit: "La simple lésion est une cause de nullité, en faveur du " mineur non émancipé, contre toutes espèces d'actes lorsqu'il " n'est pas assisté de son tuteur, et lorsqu'il l'est, contre toutes "espèces d'actes autres que ceux d'administration." En parlant de ce dernier article, les codificateurs disent, dans leur rapport, vol. 1, page 13: "Cet article pose la règle générale quant à l'effet de la lésion des mineurs : il diffère de l'article " 1305 du code français sur le même sujet. Ce dernier article " donne lieu à une variété d'interprétations dont les commen-" tateurs se sont aidés pour soutenir des opinions très diver-" gentes. Il n'est guère nécessaire de dire que les commissaires " ont tâché d'éviter l'ambiguïté d'expressions qui a causé tant " de discussion, et ils croient avoir rendu en termes non équi-" voques la règle qui prévaut dans notre droit." J'avoue qu'il me semble cependant que notre article n'est pas très lucide. Les commentateurs s'accordent à dire que l'article 1305, et ceux qui s'y rattachent du code Napoléon, sont très obscurs, et, ma'gré ce qu'en disent nos codificateurs, les articles correspondants de notre code ne me semblent guère plus clairs. Mais comme ils nous sont donnés comme loi préexistante, nous avons l'avantage d'avoir pour nous guider sur la question les com-

mentateurs sous la Coutume de Paris, et la jurisprudence sous l'ancien droit français, en même temps que l'opinion des commentateurs sous le code Napoléon. Je n'ai pas à traiter ici, dans toute son étendue, la question de la capacité et de l'incapacité des mineurs. Il s'agit, dans la présente cause, d'un prêt d'argent fait à un mineur, et voici toute la question : Est-ce à celui qui a prêté à un mineur à prouver que l'argent a profité à ce mineur pour recouvrer contre lui, ou bien est-ce au mineur à prouver qu'il a été lésé pour faire renvoyer l'action? Je n'hésite pas à dire que c'est au demandeur à prouver l'emploi utile de l'argent. Sous le droit romain, comme sous la Coutume de Paris, et sous le code Napoléon, le prêt fait à un mineur a toujours été mal vu. Le sénatus-consulte Macédonien, et différents arrêts des Cours et des Parlements de France ont défendu expressément de prêter aux mineurs, et aux fils de famille, et Lallier, lors des conférences sur le Code Napoléon, appelait le prêt à un mineur "ce fléau de l'inexpérience." La loi présume, en pareil cas, 1° que celui qui prête connaît l'état de la personne qui contracte avec lui; 2º que le mineur est trop irréfléchi, et a trop peu d'expérience pour employer utilement son argent; 3° que celui qui prête à un mineur, contrairement au vœu de la loi, sans exiger que celui-ci soit assisté de son tuteur, encourage le vice, la débauche et la prodigalité, ou bien veut profiter de la faiblesse de son emprunteur pour exiger des intérêts usuraires et l'amener à sa ruine. Cependant la loi ne refuse pas entièrement au prêteur tout recours. Si le mineur a profité de cet emprunt, la règle d'équité naturelle qui veut que personne ne s'enrichisse aux dépens d'autrui, prévaut toujours, et permet au prêteur de recouvrer, mais seulement pour autant que le mineur a profité de l'emprunt, et quatenus locupletior fecit. Et c'est au prêteur à prouver quatenus minor locupletior factus est, et l'emploi utile de l'argent. Le mineur n'a pas de preuve de lésion à faire : la loi le présume lésé, et c'est là, une des présomptions légales dont par l'article 1239 du Code. Et même si le mineur a emprunté, assisté de son tuteur, sans l'autorisation du conseil de famille, c'est là la loi. Car le tuteur lui-même n'a pas le droit d'emprunter pour son pupille. "Sans l'autorisation du juge ou du protonotaire, accordée sur avis du conseil de famille, il est interdit au tuteur d'emprunter pour son pupille," dit l'article 297 de notre code. Dans la présente cause, le défendeur, alors mineur, a consenti cette obligation pour argent emprunté du demandeur, non seulement sans autorisation de justice, sans l'avis du conseil de famille, mais même sans son tuteur. Le mineur émancipé même n'a ce droit que s'il est commercant, et alors, seulement pour les fins de son commerce (art. 321). Et si le débiteur d'un mineur paie à ce mineur seul,

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malgré la faveur de la libération, c'est au débiteur à prouver que ce qu'il a payé a tourné au profit et à l'avantage du mineur, suivant l'article 1146: "Le paiment fait au créancier " n'est pas valable, s'il était incapable de le recevoir, à moins " que le débiteur ne prouve que la chose payée a tourné au , " profit de ce créancier." Voir là-dessus, Pothier, Obligations, nº 504, et les autorités citées au code Lahaye, sur l'article 1241 du Code Napoléon. Et par les articles 1009 et 1011 de notre code, si un mineur non autorisé vend un immeuble £500, et les reçoit, il pourra plus tard se faire remettre cet immeuble, et aura l'immeuble et les £500, à moins que celui qui les lui a payés prouve que cet argent a tourné au profit du mineur, même si, au contrat de vente, ce mineur était assisté de son tuteur, pourvu qu'il y eût absence de l'avis du conseil de famille, ou de l'autorisation en justice. Et avant l'article 1010 de notre Code, qui est de droit nouveau, même quand toutes les formalités voulues avaient été remplies, il y avait encore pour le mineur lieu à la restitution, mais alors il lui fallait prouver lésion, et c'est dans ce cas qu'il était restitué comme lésé et non comme mineur, et que s'appliquait la maxime: Minor restituitur non tanquam mi r sed tanquam lasus. Vide Meslé, Minorité, ch. 24, p. 503. Dans le recueil des arrêt de Louet, lettre M, ch. 19, après avoir cité différentes décisions sur la question, le commentateur Brodeau remarque : "Quand un mineur vend son immeuble par contrat volontaire, sans avis des parents, sans solennité, sans décret, ni autorité de justice, ou emprunte de l'argent ou rente, ou par obligation, l'on présume que par la même facilité qu'il a été induit à vendre ou à constituer la rente, et à passer l'obligation, il l'a été pareillement à reconnaître avoir reçu le prix mentionné au contrat: c'est donc à l'acquéreur qui a acquis, ou au créancier qui a prêté frauduleusement, de mauvaise foi, et contre l'autorité des lois, à prouver que le prix est tourné au profit du mineur, à l'emploi duquel il a dû veiller pour sa sûreté." Ferrière, Dict. Droit, Verbo Mineur, page 280: "De ce principe, qu'un mineur ne peut être restitué que quand il a été lésé, il s'ensuit encore qu'il n'est pas restituable contre les obligations qu'il a faites pour son utilité et à son avantage; en sorte que, s'il s'est obligé pour chose qui ait été employée à la conservation de ses biens, quoiqu'il prouve sa mino. rité, il ne peut être restitué; mais il faut que la partie adverse prouve que in rem et utilitatem ejus versum est." Ferrière, Grand Coutumier, 3me vol., sur art. 239, nº 34. p. 516, dit: " Tout mineur est restituable contre les promesses qu'il a faites et les obligations qu'il a contractées pour prêt d'argent, à moins que le créancier ne prouve que le mineur l'a employé in rem et utilitatem suam, et quatenus versum est, il n'est pas restituable ; et quoique lu

cause du prêt soit exprimée, le créancier est tenu de justifier de l'emploi." Pratique de Lange, vol. 1, p. 496 : " Quand le mineur se plaint d'être lésé, est-ce à lui à justifier la lésion? Il faut distinguer: Quand les actes contre lesquels il demande d'être restitué ont été faits dans les formes, comme s'il s'est obligé étant assisté de son tuteur ou curateur ; si ses immeubles ont été vendus par avis de ses parents homologué en justice, c'est à lui à justifier la lésion dont il se plaint, parce qu'en ce cas elle n'est pas présumée; mais s'il s'est obligé sans être assisté de tuteur ni de curateur, s'il a vendu, aliéné ou hypothéqué ses immeubles sans avis de parents ou autorité de justice, en ce cas, c'est au créancier qui a prêté, ou à l'acquéreur qui a acheté de lui, à justifier que les deniers qui lui ont été baillés sont tournés à son profit." Et Rousseau de Lacombe, Recueil de Jurisprudence, Verbo Restitution, sect. II, dit: "De même, " en cas d'emprunt fait par le mineur, c'est à celui qui a prêté " à justifier de l'emploi utile." Ferrière, Parfait Notaire, vol. 1, p. 201 : "Il n'y a donc pas de sûreté à prêter à un fils de famille, surtout quand il est mineur: un tel contrat peut être fort aisément annulé et cassé, si ce n'est que le prêt fut fait pour l'utilité du mineur, comme pour subvenir à ses aliments, et c'est ce qu'il faut exprimer dans l'acte pour la sûreté du créancier, qui doit veiller à bien stipuler l'emploi; car dans ce cas, c'est à lui à prouver que le prêt a tourné à l'utilité du mineur." Prévôt de la Jannès, vol. 2, p. 336, traite la question dans le même sens. Domat, Lois Civiles, vol. 1, liv. 4, titr. 6, sect. 2, par. 17: "Ce n'est pas assez pour empêcher la restitution d'un mineur obligé par un prêt qu'il ait effectivement reçu la somme prêtée, mais il faut de plus qu'il en ait fait un emploi utile. Car celui qui prête doit connaître la condition de son débiteur s'il est majeur ou mineur, et le sachant mineur il a dû prendre soin de l'emploi des deniers qu'il voulait lui prêter." Meslé, Des Minorités, ch. 24, non 50 et 51, p. 533: "Quand l'argent que le mineur a reçu à prêt a tourné à son profit, et a été, par exemple, employé au paiement de ses dettes, il n'y a pas lieu à la rescision : le mineur demeure obligé à rendre le prêt, parce que son obligation ne vient pas tant de son consentement que du profit qu'il a fait. Quand le mineur a emprunté de l'argent par contrat volontaire, sans avis de parents, ni décret du Juge, c'est au créancier à prouver que l'argent a tourné au profit du mineur." Vide le même, ch. 24, n° 5, et aussi page 819, arrêt cité de 1560. Gin, Analyse du droit François, pp. 270, 379. Pothier, sur la question, parle comme suit (du prêt de consomption, n° 21): "Il est évident ate le contrat de prêt de consomption, de même que tous les autres contrats, ne peut intervenir qu'entre des personnes oables de contracter. C'est pourquoi le prêt d'une somme

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d'argent qui serait fait à un fou, à un interdit, à un mineur qui l'emprunterait sans l'autorité de son tuteur, est nul. Il est vrai que, si ces personnes ont profité de la somme, elles sont tenues de la rendre jusqu'à concurrence de ce qu'elles en ont profité. Mais cette obligation ne naît pas proprement du prêt qui leur a été fait, puisque ce prêt est nul : elle naît du précepte de l'équité naturelle, qui ne permet pas de s'enrichir aux dépens d'autrui. Jure natura aquum est neminem cum alterius jactura locupletari." Voir aussi Pothier, des Obligations, nos 49 à 53. Bourjon, Droit commun de la France, vol. 2, p. 590. "No 35. Le mineur est restituable contre les promesses et obligations, et tous actes portant emprunt de deniers, à moins que le créancier ne justifie que les deniers ont tourné au profit du mineur : cessant cette justification de sa part, la voie de la restitution en entier est pleinement ouverte. No 36. En effet, cessant cette justification, tel acte porte avec lui-même la preuve de la lésion, parce que, confier des deniers à un jeune homme qui les doit perdre, c'est les perdre soimême: l'emprunt, en ce cas, fait donc incontestablement ouverture à la restitution en entier : il porte avec lui-même la preuve de la lésion que la présence du tuteur ne couvre pas." Voir aussi Pothier, Procédure Civile, 5me partie, ch. IV, art. 1. Œuvres de Claude Henris, observations par Bretonnier. vol. 2, p. 161, quest. 8. "Il y a des cas où le mineur est présumé de droit avoir été lésé, sans qu'il soit nécessaire de justifier la lésion.... Le second cas est l'emprent fait par le mineur: il y a une présomption de droit que l'argent qu'on lui a prêté n'a pas été employé à son profit : c'est la doctrine d'Accurse, c'est aussi les sentiments de Balde. Et Le Prêtre atteste que c'est à celui qui dit que son argent a tourné au profit du mineur à le prouver, sans que le mineur soit obligé à aucune preuve, parce que la présomption de son âge fait pour lui, et que son âge lui est une suffisante défense, et il assure que c'est la jurisprudence du Parlement." Et, à la page 977 du même volume, question 182, dans un de ses plaidoyers, Claude Henris dit: "Au reste nous dîmes que nous ne croyons pas que l'on voulût soutenir que c'est au débiteur à prouver que rien n'a été converti à son profit, car, outre que c'est une négative, nos lois et les arrêts chargent le créancier du mineur à vérifier l'emploi des deniers, par cette raison générale que qui contracte avec un mineur, avec une personne suspecte, debet esse curiosus de versione in rem. Et quoiqu'on dise que minor non restituitur quid minor, sed quid læsus, il suffit de répondre que de ce qu'il s'est obligé mineur, et qu'il ne paraît pas qu'il en ait profité et que ce soit pour cause légitime, il est présumé lésé; et partant, qu'à défaut de prouver un juste emploi, et la minorité et la lésion présumée semblent simplement concourir." Et l'auteur cite sentence du 24 décembre 1657, qui l'a ainsi jugé. Nouveau Denizart, verbo lésion, nº 17: "En un mot, le mineur est toujours présumé lésé: c'est à ceux qui ont contracté avec lui ou avec ses tuteurs de prouver que ce qu'ils ont prêté a tourné au profit du mineur." Danty, preuve par témoins, page 490: "On demande si le créancier qui a prêté de l'argent à un mineur, en l'absence et sans l'autorité de son tuteur, peut demander en conséquence de l'obligation qu'il a passée avec lui, quoique nulle, à prouver par témoins que le mineur a fait un emploi utile de son argent, et qu'ainsi il est tenu de lui restituer; on répond que cela ne doit pas être permis, parce que la loi défendant de prêter de l'argent au mineur sans l'autorité de son tuteur, celui qui ne laisse pas de le faire suit entièrement la foi du mineur, et ne doit être admis à la preuve par témoins, qui est un secours que la loi ne donne pas à celui qui a méprisé ses défenses. Outre qu'il y va de la sûreté du mineur que l'on exposerait par ce moyen à une ruine évidente par le témoignage des témoins que l'on pourrait suborner; ainsi il est juste d'obliger le créancier à rapporter la preuve par écrit que le mineur a profité et employé utilement son argent en des choses nécessaires." Et Toullier, vol. IX, nº 105, dit exactement la même chose. Boileux, vol. 2, page 437, sur article 457, dit: "L'emprunt est une voie d'autant plus périlleuse qu'elle procure pour un certain temps à celui qui s'y engage le moyen de se faire illusion sur son état de gène, tout en le conduisant à sa ruine... Nonosbtant les termes de notre article, il est certain que le défaut d'autorisation ne priverait pas le prêteur de tout recours, car nul ne doit s'enrichir aux dépens d'autrui: mais il y a cette différence entre l'emprunt autorisé et celui qui ne l'est pas, que le mineur est toujours tenu du premier, sans égard à l'emploi que le tuteur a fait des deniers: tandis qu'il n'est tenu du second que jusqu'à concurrence de la somme qui a réellement tourné à son profit: quatenus locupletior factus est." Troplong, du Prêt, nº 209: " Passons à la capacité de l'emprunteur. De sages précautions défendent l'emprunt au mineur, même au mineur émancipé. De tous les contrats, celui qui est le plus propre à surprendre la faiblesse des esprits irréfléchis, c'est l'emprunt. Il est semé de pièges, de dangers, de déceptions; il précipiterait la ruine des familles et des mœurs, si le législateur ne s'était montré vigilant. Le tuteur lui-même ne peut emprunter sans l'autorisation du conseil de famille." Vide Favard de Langlade, Répertoire, verbo Nullité, par. 1, 2, 4, et verbo Tutelle, par. 9, nºs 12, 13, 14; Merlin, Répert., vo Mineur, par. 1, nº 3; Bonjean, des Actions, vol. 2, note au bas de la page 452; Bioche, Procédure, vo Aveu, nº 17. Fréminville, des Minorités, vol. 2, nº 743: " A défaut de l'autorisation du conseil de famille, l'em-

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prunt qui aurait été effectué se trouverait frappé de nullité, en ce sens qu'il ne pourrait produire aucune action en faveur du prêteur. Celui-ci ne pourrait agir contre le mineur qui ne serait tenu au remboursement de la somme empruntée que jusqu'à concurrence de ce dont il aurait profité. Dans ce cas l'action à diriger contre le mineur ne serait pas l'action du prêt: elle ne serait fondée que sur le principe que nul ne peut s'enrichir aux dépens d'autrui; ce serait à celui qui a prêté à prouver que tout ou partie de la somme prêtée a profité au mineur. La seule réception de l'argent ne suffirait pas pour faire présumer que le mineur a été rendu plus riche." Idem, nºs 718, 747, 627, 21, 221, 245. Larombière, des Obligations, vol. 1er, page 162: "Pourquoi le mineur, pourquoi l'interdit pour démence, pourquoi le prodigue sont-ils généralement incapables? C'est que la loi présume d'après leur âge ou l'état de leur intelligence que leur raison n'est pas assez mûre ou est trop affaiblie pour donner un consentement éclairé et réfléchi. Si le mineur est incapable, ce n'est pas qu'en fait, il soit toujours et complètement incapable de discernement et de raison... Mais la loi a voulu prévenir une foule de procès, en fondant une présomption d'inintelligence sur l'âge des personnes, et elle a bien fait." Dalloz, Répertoire, verbo Minorité, n° 35 : "L'incapacité du mineur n'est que relative, il peut améliorer sa condition, et ce n'est pas tant comme mineur que comme lésé qu'il peut attaquer les actes qu'il a consentis: minor non restituitur tanguam minor, sed tanguam læsus: d'où l'on doit conclure qu'il doit prouver, dans ce cas, que l'acte lui cause un préjudice quelconque. Mais si l'acte était entaché de nullité. le mineur serait dispensé de prouver qu'il a été lésé." Idem, n° 534 : "La nullité du prêt résulterait-elle de l'inobservation des formalités prescrites par l'article 457 (297 de notre code)? Sans aucun doute... Cependant si l'emprunt avait profité au mineur, il serait obligé jusqu'à concurrence du profit qu'il en aurait tiré." Idem, nº8 530, 531, 740, 835. Marcadé, vol. 2, sur art. 457, n° 260, après avoir dit que la vente ou la cession d'hypothèque que le tuteur ferait sans l'avis de parents serait nulle, continue ainsi: "Il n'en serait pas absolument de même de l'emprunt: nul sous un rapport, il pourrait se trouver valable pour une autre chose. En effet, le mineur ne serait pas obligé dans le principe même de l'acte; mais si l'argent emprunté lui avait vraiment profité il se trouverait obligé par suite de gestion d'affaire, qui veut que celui dont l'affaire a été bien administrée remplisse les engagements que le gérant a contractés en son nom." Solon, Nullités, vol. 1er, nos 77 et seq.; Solon, Nullités, vol. 2, nº 76; Troplong, Priv. et Hyp., nos 487 à 493. Delvincourt, Notes et Explications du 1er vol., p. 303 : " Si cependant l'emprunt avait tourné au profit du TOME XXIII.

mineur, il n'est pas douteux qu'il n'en soit tenu, non par l'effet du contrat, mais d'après cette maxime de l'équité Nemo debet cum alterius damno locupletari... Mais lorsqu'il n'y a pas eu d'autorisation, le prêteur ne peut agir contre le mineur qu'en prouvant que l'emprunt a tourné à son profit, et quatenus licuplation factus est." Idem, 2nd vol., p. 593; Idem 8e vol., p. 301; Demolombe, Minorité, vol. 1er, nº4 728, 739, 812 à 826; Demolombe, des Contrats, vol. 1er, nos 191, 289 et seq.; Toullier, vol. 6, no 106; Toullier, vol. 7, nos 521 à 584; Duranton, vol. 8, no 598 à 696; Duranton, vol. 10, no 279 et seq.; Bédarride, du dol et de la fraude, vol. 1, nº 109 à 127. La Cour impériale de Riom, le 1er juin 1870, a décidé: " Que l'obligation contractée en état de minorité ne peut être validée, sur le double motif d'une part que le billet souscrit par le mineur énoncerait "valeur reçue comptant," d'autre part que le mineur ne prouverait pas, n'alléguerait même pas que la somme à lui versée ne lui a pas profité. Que le mineur n'a pas à faire une pareille preuve ; que c'est au prêteur, au contraire, qu'incombe pour faire maintenir l'acte passé en minorité, l'obligation de prouver que l'argent prêté au profit du mineur a profité à ce dernier." Cette décision est rapportée au 2nd vol. de la Revue Légale, page 60. La cause de Cartier vs Pelletier (1er vol. Revue Légale, p. 46 et 20 R. J. R.Q., pp. 290 et 548) citée par le demandeur à l'audition me paraît certainement en sa faveur. Mais je ne puis acquiescer à cette décision. Je crois que les autorités que j'ai citées établissent clairement que pour réussir dans la présente cause, le demandeur devait alléguer et prouver que le défendeur a profité du prêt qu'il lui a fait. Sans cette preuve, le défendeur ayant établi sa minorité, lors de l'emprunt, l'action doit être renvoyée avec dépens. Action déboutée, (18 J., p. 12)

J. PERRAULT, pour demandeur. F. X. FRENETTE, pour défendeur.

PRETE-NOM .-- VENTE DE CREANCE.

COUR DE REVISION, Montréal, 30 avril 1872.

Coram Mackay, J., Torrance, J., Beaudry, J.

JOSEPH NAULT VS ANDRÉ CHARBY et al.

Jugé:—1. Qu'un consionnaire d'une créance, cédée apparemment, par l'acte de transport, pour bonne et valable considération, peut poursuivre le recouvrement de la créance ainsi cédée, quand même, par convention entre le cédant et le cossionnaire, non exprimée à l'acte, il ne serait, quant à la perception de cette créance, que le procureur et mandataire du cédant.

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et ava quête, par l'effet mo debet a pas eu eur qu'en quatenus Idem Se 789, 812 9 et seq.; 584 ; Dun[∞] 279 et .09 à 127. décidé : peut être t souscrit " d'autre même pas le mineur êteur, au sé en miprofit du rapportée le Cartier . R.Q., pp.

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mment, par poursuivre convention il ne serait, mandataire 2. Que dans la cause actuelle, le demandeur ne pouvait être considéré mandataire et procureur que vis-à-vis des cédants et devait être considéré cessionnaire véritable vis-à-vis des débiteurs (les défendeurs), et avoir saisine vis-à-vis d'eux.

Par acte du 25 février 1869, un certain nombre des créanciers du défendeur Charby, tous indiqués à l'acte, déclarèrent qu'ils consentaient à tenir quitte ce dernier, moyennant le paiement de 10s. dans le louis sur leurs créances, et lui donnèrent, de fait, quittance et décharge de leurs créances, moyennant 10s. dans le louis, qu'ils transportèrent de suite par le même acte au demandeur, en stipulant que ce transport était fait pour valable considération, et qu'ils subrogeaient le demandeur dans tous leurs droits contre Charby pour la répétition de leurs dites créances ainsi réduites. Il fut de plus stipulé dans l'acte que cette décharge ne tiendrait qu'à la condition que Jacques Jodoin et Joseph Brodeur, les deux autres défendeurs, consentiraient, conjointement et solidairement avec Charby, une obligation au demandeur, qui était aux droits des dits créanciers, pour la somme totale représentant 10s. dans le louis sur leurs créances respectives; et certains délais seraient alors donnés aux défendeurs pour le paiement de cette obligation. La condition fut remplie, et dans l'acte d'obligation, les défendeurs reconnurent devoir au demandeur, en sa qualité ciaprès mentionnée, la somme de 900 dollars qu'ils promirent payer au demandeur, ès-qualité, dans les délais mentionnés à l'acte. Il fut ensuite mentionné au ditacte d'obligation que ce dernier acte "était consenti et accepté en conformité d'une convention intervenue entre Charby et ses créanciers, en vertu d'un acte passé le 25 février 1869, devant Bernier, notaire," ce dernier acte n'étant autre que celui sus-indiqué. Un paiement est devenu échu par l'acte d'obligation, et le demandeur, en sa qualité de créancier, en vertu de cet acte, et de cessionnaire en vertu du transport du 25 février 1869, fit la poursuite pour le recouvrement de cet instalment. Les défendeurs ont plaidé, en substance, que, tant dans l'acte de transport que dans l'acte d'obligation, le demandeur n'était en réalité que le procureur et le mandataire des créanciers, assujetti à leur rendre compte des deniers qu'il percevrait des défendeurs, et qu'il n'avait jamais donné aucune considération ni valeur pour ce transport, et qu'en conséquence, le procureur ne pouvant jamais poursuivre en son nom privé, la poursuite était mal fondée. Le demandeur prétendit qu'en supposant qu'il ne fût vis-à-vis des créanciers, que leur mandataire, assujetti à leur rendre compte, il n'en était pas moins vis-à-vis des défendeurs le véritable cessionnaire de la créance et avait seul le droit d'en poursuivre le recouvrement. A l'enquête, le demandeur, interrogé, déclara qu'en effet il n'avait pas donné valeur et considération pour le transport, qu'il était obligé de rendre compte aux créanciers, et qu'il n'était en réalité que leur mandataire, mais que les créanciers ne lui avaient fait ce transport en la manière dont il avait été fait que pour éviter la multiplicité des poursuites, dans le cas où

il aurait fallu poursuivre les défendeurs.

La cour de Circuit à St-Hyacinthe, présidée par le juge SICOTTE, rendit le jugement suivant, déboutant l'action du demandeur, savoir: "La cour, attendu, en fait, que le demandeur n'a parlé et agi, dans les actes invoqués, que pour faire les affaires des créanciers nommés dans l'acte du vingt-cinq février 1869; que cela découle évidemment de ces actes, et qu'il le reconnaît lui-même dans son témoignage; qu'il n'a pas été fait autre chose, par l'acte susdit, qu'une indication par les créanciers du débiteur de la personne du demandeur pour recevoir l'obligation convenue, et prombe pour assurer le paiement dû à ces créanciers et les argents qu'il aurait à payer; considérant que le demandeur a accepté l'obligation du douze mars 1869, dont l'exécution et le paiement sont demandés par l'action pour les créanciers en question, et comme leur mandataire, et que les débiteurs n'ont pas traité avec lui, comme étant leur créancier, mais bien comme le mandataire de leurs véritables créanciers; considérant que les défendeurs sont bien fondés à s'opposer à l'action prise par le demandeur en son propre nom, comme ils l'ont fait par leurs défenses, déclare le demandeur non recevable et sans qualité pour exercer la présente action, et réclamer condamnation en son nom, et pour son profit contre les défendeurs, pour la somme que les défendeurs ont reconnu devoir par l'acte du douze mars 1869, relaté dans la demande, et le déboute de son action."

Ce jugement ayant été porté en revision, fut renversé par la cour de revision, qui rendit jugement en faveur du demandeur comme suit: "The Court, considering there is error in the said judgment, to wit, in holding the defenses of defendants well founded, and in dismissing plaintiff's action, for the reasons set forth in said judgment, doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises; Considering that plaintiff has sufficiently proved his allegations material against defendants, to entitle him to a judgment against them as prayed by him; Considering that, as against defendants, plaintiff was and is such a commissaire, and had and has such a saisine, as that he can give good receipt, to defendants for the amount he sues for and is entitled to have the amount sought to be recovered by him in and by this action for the reasons set forth in his declaration, and as

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therein and thereby claimed; and, this notwithstanding anything pleaded by defendants; Considering also that defendants are without interest to oppose to plaintiff want of right of action as they do: Doth condemn defendants to pay plaintiff \$158.85, with interest thereon from the 1st November, 1869, till perfect payment." (18 J., p. 19)

CHAGNON & SICOTTE, DORION, DORION & GEOFFRION, for

FONTAINE, MERCIER & DECAZES, for defendants.

SYNDICS D'ECOLES

Cour Supérieure, Saint-Hyacinthe, 29 avril 1873.

Coram SICOTTE, J.

J. A. Cushing vs Les Syndics d'écoles pour la Munici-PALITÉ D'ACTON-VALE.

Jugé: 1º Que, quoique le statut relatif aux Ecoles communes ne confère pas spécialement aux syndics des Écoles dissidentes un titre corporatif quelconque, ils sont néanmoins constitués en corporation par le statut, et doivent avoir et ont un titre corporatif, virtuellement énoncé dans le statut, étant, par implication, celui donné aux com-missaires d'écoles, savoir: "Les Syndics d'Ecoles pour la municipalité

de...... dans le comté de......

2º Qu'il ne peut y avoir dans une municipalité qu'une école dissidente ou de la minorité, sous la régie de Syndics d'écoles, et que le statut ne peut être interprété de manière à permettre aux diverses dénominations religieuses d'avoir, dans une municipalité, chacune leur

propre école dissidente sous la régie de syndics particuliers.

Les défendeurs sont poursuivis sous le titre corporatif de "Les Syndics d'Ecoles pour la municipalité du village d'Acton-Vale, dans le comté de Bagot, corps politique et incorporé, ayant son bureau d'affaires en le village d'Acton-Vale, dans le comté de Bagot, dans le district de Saint-Hyacinthe." Les défendeurs ont fait une exception à la forme, plaidant défaut d'assignation valable. Les défendeurs ont prétendu qu'ils n'étaient pas assignés sous leur nom véritable; que, par le statut relatif aux écoles communes, ils n'avaient pas de nom ou titre corporatif; et que, d'ailleurs, les diverses dénominations religieuses pouvant avoir leurs propres écoles dissidentes, avec leurs syndics particuliers, il appert évidemment que le titre corporatif générique de syndics d'écoles pour telle municipalité ne pouvait leur être donné, et que cela était probablement la raison pour laquelle le législateur ne leur avait pas donné de titre corporatif. Le demandeur répondit qu'il ne pouvait y avoir qu'une école dissidente ou de la minorité, sous la régie de syndics d'écoles, dans chaque municipalité; et que, dans tous les cas, le titre corporatif donné était le véritable titre de la corporation des syndics, étant par implication le même titre que celui donné aux commissaires d'écoles.

PER CURIAM: La loi (Statuts Refondus du Bas-Canada, ch. 15) veut qu'il v ait, dans chaque municipalité, des écoles communes, et que ces écoles soient régies par des commissaires d'écoles, ou par des syndics d'écoles, sect. 27. Les commissaires d'écoles sont déclarés être corporation. Les syndics d'écoles sont également déclarés être corporation, sect. 57, § 3. Les pouvoirs, les responsabilités, le but, la succession, sont absolument les mêmes. Ce qui constitue essentiellement toute corporation, la continuité, existe pour les syndics comme pour les commissaires. Il peut être utile de noter de suite, quelques autorités sur la matière. "It has been held that a body will be taken to be a corporation, when it is constituted by an act of Parliament, in such a way, and for such purposes, as shows that the meaning of the Legislature was that the body should have a perpetual duration. A body is said to be a corporation by implication, when, constituted by any legal means, it is found that the purposes intended cannot be carried into effect without attributing the corporate character to such a body. Thus an act incorporating the inhabitants of Dale with power to choose a mayor, imposes by implication the name of the mayor and commonwealth of Dale." Grant. on Corporations. Les syndics sont les représentants de la minorité religieuse; les commissaires, ceux de la majorité religieuse. C'est là toute et la seule différence. Ces mots, majorité religieuse, ou minorité religieuse, dans tous les actes concernant l'instruction publique, veulent dire la majorité ou minorité catholique, ou protestante, suivant le cas. C'est l'interprétation donnée par le législateur dans l'acte de 1869. En 1870, on a fait une exception pour les Juifs, en leur permettant de se faire inscrire sur le rôle des catholiques ou des protestants à leur choix. L'égalité des droits, des minorités et des majorités, est exprimée dans chaque disposition du Statut. Toutes deux sont incorporées, pour assurer le même objet: gouvernement scolaire et l'avancement de l'éducation. Cate égalité n'existerait pas si les avantages n'étaient pas les mêmes, par la différence dans les facultés pour l'accomplissement des devoirs, et le fonctionnement général du système. Le nom collectif de corporation confère un avantage considérable dans toutes les matières importantes. L'action serait moins facile, plus désagréable, s'il y avait nécessité de mettre en avant des noms propres dans toutes les affaires. Il y aurait une cause incessante de troubles, de procès dans

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les changements des noms mêmes; tandis que le nom corporatif est toujours debout, toujours prêt, fait cesser bien des difficultés, apaise bien des différends. Il n'y aurait réellement pas de corporations si des individus, avec leurs noms et prénoms, doivent se nommer, ou être nommés chaque fois qu'ils doivent agir, ou qu'on doit agir contre eux. Or la loi a bien créé une corporation de Syndics d'écoles, dans l'intérêt des minorités. Dans toutes ces dispositions, elle les appelle et les nomme "Les Syndies d'écoles," comme elle désigne et nomme la corporation de la majorité "les Commissaires d'écoles." C'est le même baptême. Le nom corporatif des Syndics est dans la loi comme celui des commissaires implicitement (by implication) aussi bien que par disposition expresse. Ce nom est purement et simplement: "Les Syndics L'action est donc bien dirigée. Exception à la forme renvoyée. (18 J., p. 21, et 4 R. L., p. 531)

Bourgeois, Bachand & Richer, avocats du demandeur. Chagnon & Sicotte, evocats des défendeurs.

PARTNERSHIP.

SUPERIOR COURT, IN REVIEW,

Montreal, 29th November 1873.

Coram Mondelet, J., Torrance, J., Beaudry, J.

CUVILLIER et al. vs GILBERT et al.

Held: That an agreement between partners, carrying on business as iron founders, that no contract for the purchase or sale of material exceeding \$100 was to be made without the consent of both, did not exempt the partnership from liability to a third party, under a contract of sale of pig iron exceeding \$100, made by one partner, in the firm's name, such sale being within the scope of the partnership business, and the purchaser buying in good faith.

MONDELET, J., dissentiens: The judgment appealed from was rendered on the 17th December, 1872, by the Superior Court, at Montreal, Mackay, J. The question which that judgment appears to have decided is one of considerable interest, so far as commercial transactions are concerned. Let us precisely state the fals, and, then, we shall inquire how the law is to be declared to exist, with respect to this case in particular. The defendants are alleged by plaintiffs to be "iron and brass founders, heretofore co-partners, doing business as such together, at Montreal, under the name and

firm of Gilbert & Mitchell." It is in evidence, as alleged, that, on the 20th December, 1871, a sale was made to plaintiff, by Dawes, a broker, of 125 tons of pig iron, at \$24 per ton, payable in cash, less six per cent, as per broker's note delivered to plaintiff. That sale is alleged to have been made by defendants, but it is, in fact, Mitchell who caused it to be made, without the participation of Gilbert. The plaintiffs, not having had delivery of the iron, have brought the present action. They claim \$680 damage. They, previous to the institution of the action, offered to defendants \$2820, à bourse déliée, being the price of said sale. The defendant Mitchell is proceeded against by default. Gilbert, the other defendant, pleads that he had been in co-partnership with Mitchell, the other defendant, since the 11th April, 1871, but the partnership ceased before the institution of this action, that, as to the sale in question, Gilbert was wholly ignorant thereof, nor had Mitcheli any authority or power whatever to enter into such sale, which was beyond the scope of the co-partnership. To simplify this case, it is sufficient to inquire as to what the nature of the above copartnership was. The answer is at hand. Defendants were "iron and brass founders, doing business, as such, together;" they were that, and nothing else; they were not traders, by any means, in iron; consequently, it was their business, as well as their duty, to confine themselves to what the article of co-partnership had laid down for their guidance. Such sale as the one now in question is beyond the scope of the co-partnership. It is important not to lose sight of this, in the solution of the question, because, if Mitchell did what he was not authorized to do, Gilbert is not bound, and, if he is not bound, the action cannot stand against him. Now, whatever obligation there was in plaintiffs, before entering into such a transaction as this sale is pretended to be, to inquire or not as to what were the limits of the co-partnership, one thing is, I think, so certain that it can't be gainsaid, every one, and, especially plaintiffs, were bound to know and remember, and they well knew, what kind of business defendants carried on; they, as well as the public, knew it, and could not ignore it. That point once made out, it, of course, follows, that they bought, at their own risk, and it must be to their own loss, the 125 tons of iron, for the sale of which Gilbert is not to be held responsible. The plaintiffs are not to be presumed in bad faith, quite the contrary; but they, no more than any other party, have a right to claim the enforcement of a sale which one of the defendants had no right to make, and which the other defendant repudiated, as soon as he knew of it, and as a necessary sequence, plain-

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tiffs have no right to claim damages for the non-execution of the sale, as far as Gilbert is concerned. No confusion in commercial matters and business need be feared from a decision, in view of the above. One only requires to consider whom one deals with, and abstain from purchasing from a party who has no right to sell. This applies to all transactions, whatever they are or may be. In other words, if there is a deed of co-partnership, and, if it be, as it ought to be, duly registered, it should be examined, before any transaction is entered into with the firm. If there be no articles of partnership, or, if such deed or articles be not registered, then parties and the public are supposed to know what kind of business is carried on, it being a business openly carried on, au su et vu de tout le monde. Therefore, if any of the partners do anything which is within the scope of the copartnership and its nature, all parties thereto become bound, whether they authorized the transaction or not. But, if any partner transcend the limit of the co-partnership, whether stipulated in writing, or of its nature or character, ostensible and known to the public, no obligation is thereby fastened on the other partners. That is law I believe, and, if so, it must be, and it is right and just therefore. The above enunciated principles must, in my opinion, govern this case. The conclusion which their application justifies is, that Gilbert is not bound by the sale effected by Mitchell, in the name of the firm, the action cannot stand against him but should be dismissed. The judgment rendered against Mitchell could not be reversed, because he does not complain of it. Either way, the judgment now appealed from must be reversed, quant dGilbert, with costs.

TORRANCE, J., giving the judgment of the Court: the plaintiffs, in their declaration, set out a sale by defendants to them, through Robert Dawes, a broker, on the 20th December, 1871, of about 125 tons of pig iron, for the price of 24 dollars per ton; that defendants never delivered, though duly put en demeure to do so, to the damage of plaintiffs of \$680. Only one of the defendants, Frank Gilbert, contests the demand, and pleads that he was ignorant of such sale, and that his co-partner, Alexander Mitchell, had no authority to make said sale, and was debarred therefrom by their articles of partnership; that it was not in the scope of their business to sell pig iron, in the quantities mentioned in the declaration, or to sell pig iron at all; that Mitchell had no power to bind him by such sale, and, if plaintiffs contracted for the purchase of said iron, they did so without inquiry, and without due care, and must have known the course of trade of said firm; and Gilbert notified plaintiffs, so soon as

aware of the sale that he would not carry it out. Judgment went against the co-partnership, for \$206.25, and is appealed

from by Gilbert.

Here follow the remarks made by Judge MACKAY in rendering the judgment of the Superior Court: "The articles of partnership are filed, and it is clear that Mitchell exceeded his authority, as he was to attend to the inside work of the foundry, and Gilbert to the outside, the buying and selling, etc. The sale was made below the market value, but, under art. 1012 of the code, sale cannot be set aside for this. The sale must be maintained if there is no fraud on the part of plaintiffs, and there is none. The sale of 125 tons of pig iron does not seem to be too much for one partner to do, and in many cases it might be necessary to save the credit of a firm in meeting a note set. Judgment for \$206.25"

in meeting a note, etc. Judgment for \$206.25." TORRANCE, J.: The evidence shows that defendants, Gilbert and Mitchell, by an agreement made before a notary, on the 11th April, 1871, entered into a partnership, as founders. This agreement provided that Gilbert should attend to the general management, to the keeping and collecting of the accounts, and to the looking up of business; it being understood that he was not bound to give the whole of his time, or attention, to the business. Mitchell, on the other hand, was to attend to the carrying on the business in the shop, the personal superintendence of the men, and the practical and mechanical working of the business, and was to give the whole of his time to it. All signatures of the firm were to be affixed by Gilbert alone. "No contracts or agreements, "either for the sale or purchase, or for material or goods " exceeding the value of \$100, shall be made by either party, " without the consent of the other, such consent being con-" sidered as given if no objections in writing are given to the "other party within 24 hours of his being personally notified " of such sale or purchase having been made." On the 4th of January, 1872, 65 days after the sale to plaintiffs, defendants dissolved their partnership, and, by the dissolution, the assets were transferred to Gilbert, who paid to Mitchell a considerable sum of money for his interest, and undertook to pay the debts of the firm. What is the authority of copartners to bind their firm? Lindley, Partnership, pp. [192,3] "each partner is prepositus negociis societatis, and each partner 'virtute officii,' possesses an equal and general power and authority, in behalf of the firm, to transfer, pledge, exchange, or apply, or otherwise dispose of the partnership property and effects, for any and all purposes within the scope and objects of the partnership, and in the course of its trade and business. Any restriction, which, by agreement

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among the partners, is attempted to be imposed upon the authority which one possesses, as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made." Story, Partnership, § 101: "The principle extends so as to bind the firm for the frauds committed by one parner without the knowledge of the others, &c." § 108. The French law has adopted a rule essentially the same, § 109. § 111: "The authority must be exercised in cases within the scope of the ordinary business. It would not bind if not the ordinary course of business." § 112: "If one partner should in the name of the firm make purchases of goods, not connected with the known business of the firm, such purchase would not bind the partnership." But, if the articles were such as might be applied or called for in the ordinary course of their business, the purchase of such articles would bind the firm, even though they were unnecessary at the time, or were bought contrary to the private stipulations between the partners, or were not designed to be used in the partnership at all, if the vendor were not acquainted with the facts. Collyer, Partnership, says, § 384: "It may be laid down as a general rule that partners are bound universally by what is done by each other in the course of the partnership business." 1 Parsons, Contracts, p. 155: "Among the questions which have arisen as to the limitations to the general power of a partner over the partnership property, one, not yet perhaps perfectly settled, is as to the power of one partner to make an assignment of the whole property to pay the partnership debts. We think the weight of authority and of reason is in favour of this power, and that such assignment, being entirely in good faith, would be held valid. He may sell the whole stock in trade by a single contract, p. 160: "The act of each partner is considered as the act of the whole partnership, or of all the partners, only so far as that act was within the scope of the business of the firm; but one co-parner may bind the firm in matters out of their usual course of business, if they arose out of and were connected with their usual business." See Sandiland vs Marsh, 2 B. & Ald., 673. Applying these rules here, it is impossible to say that the purchase of pig iron is not connected with the business of founders which was that of the defendants, and if the purchase, why not the sale? No case of fraud is charged against the plaintiffs who were in perfect good faith, and who were in entire ignorance of the precise relations of the two partners to one another, or of their articles of partnership. And, looking at these articles, plaintiffs' counsel has well

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called attention to the stipulation of the articles, that purchases and sales for a greater amount than \$100 shall not be made without the joint consent of the partners, but the consent may be considered as given, if no objections in writing are made within 24 hours to the other partner making the contract. As between the partners, no objection has been proved in writing within 24 hours, though at any rate, if it had been proved, it could not affect the right of third parties in good faith like the plaintiffs. Judgment confirmed, MONDELET, J., dissenting. (18 J., p. 22; 4 R. L., p. 455, et 5 R. L., p. 468)

W. H. Kerr, Q. C., for plaintiffs. W. W. Robertson, for defendants.

UNPAID VENDOR.

COUR' GUEEN'S BENCH, Montreal, 23rd June, 1873.

Coram Duval, J. C., Drummond, J., Badgley, J., Monk, J., Taschereau, J.

GAUTHIER, Appellant, and VALOIS, Respondent.

Held:—That the unpaid vendor of an immoveable, who has instituted an action résolutoire for non payment of the price, before the décret of the property, (although the judgment be not rendered until some months after) has a right to be paid by preference even to a mortgagee, whose hypothec has been registered two years before the registration of the deed of sale by the vendor.

This was an appeal from a judgment rendered by the S. C., at Montreal, Beaudry, J., on the 28th of February, 1871. The facts and circumstances of the case are fully explained in the following remarks of Taschereau, J., who pronounced the judgment in appeal:

Taschereau, J.: Appel par Séraphin Gauthier, demandeur en Cour Inférieure, d'un jugement renvoyant sa contestation de l'opposition de l'Intimé, et maintenant la collocation du même à l'ordre de distribution, et ce sous les circonstances suivantes. L'Intimé avait vendu un huitième indivis dans une terre (saisie en cette cause) au défendeur, Pierre Charles Valois, un des défendeurs, pour 2126 livres de 20 sols, et ce par acte du 13 juin 1864—le 13 mars 1865, Dame Marie-Louise Valois avait transporté à l'intimé une somme de 1667 livres de vingt sols qui lui était due par le même défendeur, sur vente d'un autre huitième de la même terre par Marie-Louise Valois à Pierre Charles Valois, suivant actes notariés

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demandeur contestation location du rconstances divis dans rre Charles) sols, et ce me Mariene de 1667, défendeur, par Marieces notariés de vente et transport. Le demandeur comme créancier des défendeurs, avait fait saisir les 14=7 de cette terre, et avait fait annoncer la vente comme devant avoir lieu le 28 juin 1870. Le 20 juin, même année, l'intimé et son frère, Léon Valois, produisent une opposition à fin de distraire, par laquelle Léon réclamait 1, et l'intimé 2 de cette terre. Sur refus d'un des juges de la Cour Supérieure de permettre l'enfilure de cette opposition, dans le but de suspendre la vente annoncée sur venditioni exponas, mais, dans l'intervalle. savoir, le 25 juin, l'intimé et Léon Valois intentent contre le défendeur, Pierre Charles Valois, une action en résiliation de vente, et ce à raison de non paiement de prix de vente, et l'action fut signifiée au défendeur, et, sur ce, l'intimé et Léon Valois présentent de nouveau une opposition à fin de distraire. avec demande de suspendre la vente, alléguant défaut de paiement et institution de leur action en résiliation. Le shérif recut ordre de recevoir cette opposition, non comme opposition à fin de distraire, mais comme opposition à fin de conserver, et la vente eut lieu le 28, le lendemain de la production de l'opposition. Les intimés ont continué leur procédure en résolution de vente, et obtinrent jugement contre le défendeur, le 31 octobre 1870. Et, le 25 novembre 1870, les intimés produisaient une dernière opposition à fin de conserver, alléguant tous les faits ci-dessus, et concluaient à être colloqués pour chacun leurs droits respectifs sur le prix d'adjudication. La question pure et simple s'élevant en cette cause est celle de savoir si, sous ces circonstances, les opposants, ou leurs représentants, n'ayant fait enregistrer leur titre de vente que longtemps après celui du demandeur qui contestait leur réclamation, pouvait primer ce dernier, présent appelant, et avoir droit à une collocation privilégiée sur les deniers. Les tribunaux de ce pays, par divers jugements, tant en Cour Supérieure qu'en Appel, oat invariablement reconnu le droit du vendeur non payé, et qui n'avait pas enregistré son titre. de se pourvoir, pour faire résoudre cette vente, même après que l'immeuble vendu fût passé entre les mains d'un tiers détenteur, ou qu'il eut été hypothéqué à des créanciers subséquents dont les titres avaient été enregistrés. Ces décisions étaient fondées évidemment sur le principe que le vendeur. en ces cas, avait, non pas un simple droit ou privilège de bailleur de fonds, mais avait conservé un droit de propriété dans l'immeuble, à défaut par l'acheteur de payer le prix de vente; en un mot, on a voulu dire que le vendeur n'était censé consentir à la vente que sous la condition résolutoire, en cas de non paiement. Si tel n'était pas le cas, je ne vois pas comment le vendeur dont l'hypothèque ou le privilège requérait enregistrement, à peine de déchéance, suivant la 4

Vic., ch. 30 (l'acte d'enregistrement) aurait pu conserver un semblant de ce privilège. Cette même question qui doit être décidée suivant nos lois existant avant le Code s'élève en cette cause avec la modification suivante, savoir que lors de la résolution de la vente, obtenue par les intimés, la propriété était irrévocablement passée entre les mains de l'adjudicataire à la vente du shérif. Le demandeur profite de cette circonstance pour dire, et avec quelque apparence de raison, que les intimés ne pourraient plus espérer faire résilier la vente de manière à les rendre propriétaires et à se présenter devant cette cour, non comme simples créanciers, hypothécaires ou privilégiés, requérant enregistrement, mais comme encore revêtus de tous les droits d'un propriétaire dont le bien est vendu, et qui, comme tel, a droit d'en toucher le prix, en préférence à tout autre créancier dûment enregistré. Il me semble que la position des intimés n'est pas changée, ni matériellement affectée par cette circonstance. En effet, ils ont institué leur action en temps utile, à une époque il est vrai où l'immeuble était sous saisie, mais sans que, pour cela, le défendeur en fût dépossédé, ni les droits de l'intimé à la résiliation affectés ou détruits. L'époque de l'institution de l'action, et non celle de son résultat final, au moven du jugement qui prononçait la résolution de la vente, doit seule être prise en considération; j'argumente lei comme si cette résolution de la vente était nécessaire; mais je ne le crois pas: au contraire, sur le principe que j'ai plus haut énoncé, je suis porté à dire que l'intimé a fait une procédure de surérogation, en demandant cette résolution, et qu'il lui suffisait d'alléguer que, comme vendeur non payé, il aurait sur cette propriété, non seulement son droit de privilège de bailleur de fonds, mais un privilège d'une autre nature, beaucoup plus effectif, celui de se pouvoir dire possesseur d'un droit de propriété sur le même immeuble, que le paiement seul pouvait éteindre. Ce privilège consiste dans le droit de réclamer la propriété même, ou la valeur qui la représente. comme dans un cas de vente judiciaire. Voyez art. 729 C.P.C., relatif au privilège du vendeur non payé. Cette Cour semble avoir confirmé l'interprétation que je donne au droit du vendeur non payé, par le jugement qu'elle a rendu le 21 mars 1872, dans la cause de Thomas vs Aylen, au rapport de laquelle cause qui se trouve au 16 Juriste, page 309, et 22 R. J. R. Q., p. 556, je réfère avec confiance. Pour ces raisons, je crois que le jugement dont est appel devrait être confirmé.

Judgment of Court below confirmed. (18 J., p. 26.) LORANGER & LORANGER, for appellant.

DORION, DORION & GEOFFRION, for respondent.

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NOTICE IN THE PAPERS.

COURT OF QUEEN'S BENCH, Montreal, 24th June, 1873.

Coram Duval, Ch. J., Drummond, J., Badgley, J., Monk, J., Taschereau, J.

HOPE, Appellant, and FRANCK, Respondent.

Held:—That the notice required by the 101st sec. of the Insolvent Act of 1869 cannot be given by advertisement in the weekly edition of a daily newspaper.

This was an appeal from a judgment of the Superior Court, at Montreal, rendered on the 25th of June, 1870, granting respondent's petition for discharge, under the 105th see. of the Insolvent Act of 1869. In appeal, it was held that the notice of the application for discharge, which had been given by advertisement (besides in the Quebec Gazette) in the weekly edition of a daily newspaper was insufficient, and the judgment of the Court below was consequently reversed.

DUVAL, Ch. J., remarked that the notices given in the weekly editions were not sufficient. Business men did not see these editions. The consequence would be that the judg-

ment would be reversed and the discharge set aside.

The following were the reasons assigned in the written judgment: "The Court, considering that respondent, John Charles Franck has not observed the requirements of the law to entitle him to the prayer contained in the petition presented by him to the Superior Court, in and for the District of Montreal, on the twenty-third day of June, 1870, praying the Court to grant him a discharge, under the provisions of the Insolvent Acts of 1864 and 1869, and, considering that respondent did not give notice of his application to the Court, as required by the Insolvent Act of 1869." Judgment of Court below reversed. (18 J., p. 28, et 14 R. L., p. 256.)

ABBOTT, TAIT & WOTHERSPOON, for appellant.

L. N. BENJAMIN, for respondent.

DECRET. -- GARANTIE.

COUR DU BANC DE LA REINE, EN APPEL, Montréal, 10 décembre 1870.

Présents: Duval, J. en C., Caron, J., dissident, Badgley, J., dissident, Monk, J., et Loranger, J.

DOUTRE VS ELVIDGE.

Jugé:—Que l'adjudicataire, à une vente par le shérif, d'un terrain de 49 acres qui n'a pas la quantité déterminée, a droit à une réduction pro rata du prix d'adjudication.

Semble:—Qu'il en serait autrement de la vente d'un corps certain. (2 R. L., p. 623, et 1 R. C., pp. 120 et 236.)

FRAUDE.-ACTION PAULIENNE.

Cour Supérieure, en Revision,

Montréal, 30 novembre 1870.

Présents: Mondelet, J., dissident, Mackay, J., et Beaudry, J.

DAVIS vs SHAW, et SHAW, Opp.

 $Jug\ell$:—Que la vente d'effets mobiliers, entre parents, non suivie de déplacement et de tradition réelle, est présumée frauduleuse vis-à-vis des tiers créanciers et doit être annulée. (2 $R.\ L.$, p. 623 ; 1 $R.\ C.$, p. 120, et 14 $R.\ L.$, p. 165.)

VENTE DES CREANCES D'UN PAILLI.-PROCEDURE.

Cour Supérieure, en Revision,

Montréal, 30 novembre 1870.

Présents: Berthelot, J., Torrance, J., et Beaudry, J.

STE-MARIE VS OSTELL.

Jugé: (Confirmant le jugement de C. S., MACKAY, J.):—Que l'adjudicataire des créances d'un failli, à une vente faile par un syndic, doit alléguer dans son action contre un débiteur de ce failli et prouver que toutes les formalités requises par la loi pour procéder à cette vente ont été observées; et qu'à défaut de telle allégation, l'action de cet adjudicataire sera déboutée sur défense en droit. (2 R. L., p. 624, et 1 R. C., p. 120.)

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COUR SUPÉRIEURE, Montréal, 30 novembre 1870.

Présent: MACKAY, J.

CARSON vs BISHOP.

Jugé:—Qu'un père, non tuteur de son fils mineur, ne peut poursuivre pour les gages de ce dernier, et une telle demande sera rejetée sur défense en droit. (2 R. L., p. 624, et 1 R. C., p. 121.)

TIERCE OPPOSITION.

Cour Supérieure, Montréal, 30 novembre 1870.

Présent: MACKAY, J.

Corporation de la cité de Montréal et Wilson, tiers Opposant.

 $Jug\ell$:— Qu'après que l'évaluation d'un terrain, soumis à expropriation dans la cité de Montréal, aura été mise de côté par la Cour, le propriétaire de ce terrain ne peut former une tierce opposition à ce jugement, bien qu'il n'ait pas été partie dans la première instance. $(2\,R.\,L.,\,\mathrm{p.}\,624,\,\mathrm{et}\,1\,R.\,C.,\,\mathrm{p.}\,121.)$

CONVENTION ILLEGALE.

COUR SUPÉRIEURE, Montréal, 30 novembre 1870.

Présent: MACKAY, J.

LEBLANC vs BEAUDOIN, et BEDARD, Intervenant.

Jugé:—Qu'une partie coupable de félonie ne peut elle-même demander la nullité d'un acte de vente d'immeubles, faite en compromis de cette félonie. (2 R. L., p. 625, et 1 R. C., p. 121.)

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TOME XXIII.

OPLIGATION SOLIDAIRE.

Cour Supérieure, Montréal, avril 1870.

Présent: MACKAY, J.

MALHIOT VS TESSIER, et LEMONDE.

Jugé:—Que deux cultivateurs qui ont signé un billet promissoire ne sont pas obligés solidairement, et que la solidarité n'existe que dans le cas où les faiseurs d'un billet sont commerçants. (2 R. L., p. 625; 1 R. C., p. 121, et 14 R. L., p. 604.)

DELAI D'APPEL.

COUR DU BANC DE LA REINE, EN APPEL, Québec, décembre 1870.

LEDUC et OUELLET.

Jugé:—Que le délai de 25 jours à compter de la date du prenoncé du jugement, établi par l'art. 1148 C. P. C. pour la signification de la requête en appel d'un jugement de la Cour de Circuit, est final et limitatif. (1 R. C., p. 122, et 2 R. L., p. 626).

ACTION EN SEPARATION DE CORPS.

COUR DU BANC DE LA REINE, EN APPEL, Québec, décembre 1870.

VILLENEUVE et BEDARD.

 $Jug\ell$:—Que, pendant l'appel d'un jugement renvoyant une action en séparation de corps la Cour d'Appel n'accordera pas une provision alimentaire à la femme, demanderesse en cour inférieure. (2 R.L., p. 626, et l.R.C., p. 122.)

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OBLIGATION SOLIDAIRE.

COUR SUPÉRIEURE, Québec, décembre 1870.

Présent: TASCHEREAU, J.

ULRIC ARCAND vs CHARLES BLANCHET, et FRANÇOIS CROTEAU.

:—Que le débiteur originaire d'une obligation et le débiteur deregué qui, dans un acte de vente, s'est obligé de payer la dette, et dont la délégation a été acceptée, ne peuvent être poursuivis tous les deux comme obligés solidairement; et qu'une action demandant une condamnation solidaire sera renvoyée sur défense en droit

In January, 1848, Croteau executed a deed of obligation for £50 and interest, in favour of Arcand's auteur, and mortgaged thereby a certain piece of land, which in june, 1855, he sold to Blanchet, who by the deed of sale bound and obliged himself to pay the said debt, and who the same day executed another deed of obligation, without novation for £75 and interest, being the principal and interest accrued on the original debt in favour of the plaintiff's auteur. Action against Blanchet and Croteau for joint and several condemnation for amount due under the said deeds. Action dismissed or murrer. No action for a joint and several condemnation ? R. L., p. 626, et 1 R. C., p. 122)

CURATEUR A INTERDIT POUR IVROGNERIE.

COUR SUPÉRIEURE, Québec, décembre 1870.

Présent: TASCHEREAU, J.

LOUIS LEMIEUX vs MARIE FORCADE, curatrice à GABRIEL LEMIEUX, son mari interdit pour ivrognerie.

Jugé:—Que la défenderesse pouvait être poursuivie seule, et qu'il n'était pas nécessaire de mettre son mari en cause, et qu'elle n'avait pas besoin d'une antorisation spéciale à cet effet. (2 R. L., p. 626, et 1 R. C., p. 122.)

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COUR DU BANC DE LA REINE, AU CRIMINEL, Montréal, 2 octobre 1867.

Coram BADGLEY, J.

LA REINE vs McNevin.

Jugé:-1° Que changer le montant d'un billet de \$500 en \$2,500,

constitue le faux d'un billet de \$500.

2° Que le billet étant signé par le prisonnier, et endossé par un tiers, mais changé quant au montant depuis l'endossement n'en est pas moins un billet forgé, quoique l'endosseur seul ait pu être fraudé, et cette altération, dans le corps du billet, ne constitue pas une fraude de l'endossement, mais du billet de l'endosseur.

L'accusation contre le prisonnier portait qu'il avait forgé (forged) un billet de \$500, signé par lui, endossé par J. Thompson, et cela depuis l'endossement, en changeant les mots "cinq cents" en "vingt-cinq cents" (twenty five hundred). La preuve établit que le billet avait été fait pour \$500, endossé par complaisance par Johnson Thompson, pour ce montant, et ensuite changé en \$2,500.

KERR demande l'acquittement du prisonnier pour deux raisons: 1° La preuve établit, dit-il, que le billet n'a pas été forgé, mais l'endossement a pu l'être. Le billet est bon contre le prisonnier pour \$2,500; mais l'endossement est-il bon pour ce montant? Non; quelle en est la raison? c'est qu'il est forgé. Supposons que l'endosseur ait consenti au changement, le billet serait bon contre lui pour tout le montant. Pourquoi cette différence? c'est que l'endossement est forgé.

LE JUGE: Du noment qu'un billet m'est donné, et que j'y appose ma signature, j'en fais mon propre billet : chaque endosseur est considéré comme un nouveau faiseur. Donc si le contenu du billet est forgé, c'est mon propre billet qui est forgé; comment l'endossement serait-il alors forgé, lorsque c'est ma signature. Les autorités sont claires sur ce point.

KERR continue: L'altération d'un document auquel ma signature est apposée, constitue le faux de la signature. Il faudrait donc dire que le prisonnier a forgé sa propre signature puisqu'il est le faiseur du billet.

Le Juge: Votre proposition n'est pas correcte. D'ailleurs, c'est le billet de l'endosseur qui est forgé, et non celui du prisonnier.

KERR: La seconde raison que j'invoque est qu'il n'y a pas eu de billet de \$500 de forgé, tel qu'allégué, mais un billet de \$2,500. Le billet de \$500 est parfaitement bon, mais c'est un 1867.

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n'y a pas billet de s c'est un billet de \$2,500 qu'on a produit et qui est forgé. Voir Rex vs Teague, Archbold, p. 485, éd. de 1862. Dans cette cause, un billet de £10 fut changé en £50, et on a jugé que l'accusation d'avoir forgé un billet de £50, était bien fondée. Si la présente accusation est maintenue, on pourra poursuivre de nouveau le prisonnier pour la même offense, en disant qu'il a forgé un billet de \$2,500, et il ne pourra plaider autre fois acquit ou autre fois convict, c'est-à-dire qu'il a déjà été mis en accusation pour cette offense.

LE JUGE: L'auteur cité ajoute, après la citation ci-dessus, que l'indictement pour faux d'un billet de £10 était aussi bon que pour celui de £50, et les Cours en Angleterre ont ainsi jugé. La manière ordinaire est de dire quel était le billet véritable, et en quoi il a été altéré. C'est justement ce qui a été fait ici. De plus, qu'est-ce que le faux, sinon la fabrication d'un document ou l'altération d'un écrit véritable : il a donc forgé le billet de \$500, en l'altérant en \$2,500. D'ailleurs le statut sur la procédare, S. R. C. de 1859, ch. 99, sect. 28, déclare que, "dans cout indictement pour contrefaçon, faux, etc., d'un instrument, ou écrit, il suffira de désigner cet instrument sous le nom ou désignation sous laquelle il est généralement connu, ou par sa teneur, sans en produire de copie ou fac-similé, ou en donner d'autre description ni en indiquer la valeur." Ce qui met fin à la question. (2 R. L. p. 711)

PROCEDURE CRIMINELLE.

COUR DU BANC DE LA REINE, AU CRIMINEL, Montréal, 4 octobre 1867.

Coram BADGLEY, J.

LA REINE vs Bourdon et McCuley.

Jugé:--1° Que le prisonnier doit attaquer les défauts de forme, ou l'insuffisance des allégations dans un acte d'accusation, par une défense en droit (demurrer), ou une motion pour casser l'acte d'accusation (to quash) avant d'entendre la preuve; mais, une fois que la preuve est produite, il faut attendre le verdict, et s'il est contraire au prisonnier, empêcher la condamnation par une motion en arrêt de jugement.

26 Que la pratique contraire, établie à Montréal, est vicieuse et ne

doit pas être suivie.

3º Que tout ce qui est nécessaire, pour constituer une offense, doit être allégué dans l'acte d'accusation, autrement il est nul.

4º Semble. Que le défaut d'alléguer que le robinet ouvert par les accusés, dans une distillerie, avait été apposé par le gouvernement pour la sûreté du revenu dudit gouvernement est fatal à l'acte d'accusation.

Cette cause se rapporte à la distillerie de Laprairie. Les prisonniers sont accusés d'avoir ouvert un robinet, ou une chantepleure, apposée par le gouvernement à une case recevant les spiritueux. Îl n'est pas allégué que ce robinet avait été apposé "pour la sûreté du revenu du gouvernement." Après l'audition de la preuve, pour la couronne, KERR, avocat des prisonniers, se lève, et demande l'annulation de tous les procédés et de l'acte d'accusation, à cause de ladite omission. Il établit, en principe, que tout ce qui est essentiel à la constitution d'une offense, doit être allégué dans l'acte d'accusation. 1 Whatton's; Archbold, pp. 852, 862. Consolidated Statutes, C., ch. 99, clause 45, Leach's Crown Law, p. 269; Archbold (éd. de 1862), p. 51. Ces autorités établissent que les termes du statut créant l'offense, doivent être employés, et si l'offense est contre un but particulier, ce but doit être exprimé.

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CARTER, pour la couronne, admet le principe ci-dessus, mais en nie l'application: d'ailleurs, cette objection vient trop tard ou trop tôt; elle aurait dû être faite avant que la preuve fût produite, ou elle pourra l'être après conviction.

RAMSAY, pour la couronne, dit que les mots omis sont seulement matière à inférence (matter of inducement) qu'il n'est pas nécessaire d'alléguer, l'acte d'accusation est suffisant; il contient plus d'allégations qu'il n'était nécessaire d'en mettre.

DEVLIN, pour les prisonniers, réplique que ces mots sont essentiels à la constitution de l'offense. Si ce robinet n'avait pas été mis par le gouvernement pour la sûreté du revenu, il n'y avait pas de crime à l'ouvrir. La poursuite l'a si bien senti qu'elle a fait la preuve qu'il avait été posé pour cela. Mais on sait que la preuve ne peut suppléer à l'omission des allégations. Ce qui prouve bien ma proposition, c'est que si la couronne n'avait pas cette preuve, il n'y avait pas d'offense prouvée, et tout le monde l'a compris ainsi. Quant à l'objection de Mr Carter, contre notre demande, je dirai que la pratique est établie ici depuis plusieurs années, de faire cette demande à l'état actuel de la procédure. Je citerai même la cause de A. Roy, décidée dans le dernier terme par l'hon. juge Drummond.

L'hon. Juge, après avoir donné à entendre que l'acte d'accusation était vicieux par ladite omission, déclare que cette objection vient trop tard : elle aurait dû être faite avant qu'on commençât à entendre la preuve; elle pourra l'être aussi après conviction, si elle a lieu. Le prisonnier n'en peut guère souffrir, car il ne peut être coupable que du crime décrit dans l'indictement; si ce prétendu crime n'en est pas

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d'accuolidated p. 269; sent que oloyés, et doit être

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acte d'acque cette ite avant rra l'être n'en peut du crime n est pas un, il sera libéré. Quant à la pratique contraire de cette Cour, je ne puis l'admettre, car elle n'est pas régulière et légale. Voir ch. 99, sect. 46, S. R. C.

Les prisonniers se défendirent, et furent acquittés par le

jury. (2 R. L., p. 713)

VENTE DE DROITS SUCCESSIFS.— PRESCRIPTION.

COUR SUPÉRIEURE, EN REVISION,

Montréal, 30 décembre 1870.

Coram Mackay, Torrance et Ramsay, JJ.

Dame H. Roy dite Audy et vir, Demandeurs, Intimés, vs H. MOREAU et vir, Défendeurs, Appelants.

Jugé:-1° Qu'une personne qui a acheté d'une autre des droits successifs, ne peut, dix ans après cette acquisition, être relevée des obligations qu'elle a contractées par l'acte d'acquisition, en prétendant que les droits qui lui ont été vendus lui appartenaient déjà.

2º Qu'en ce cas, il y a lieu à faire l'application de l'article 2558 du

Code Civil.

Par son testament, en date du 21 janvier 1816, Marie Marare, veuve de Pierre Moreau, donna et légua à Pierre Moreau, son fils, à son épouse, Geneviève Hélot, et à leurs enfants, dans les termes suivants: "Donne et lègue ladite dame testatrice au sieur Pierre Moreau, son fils, et Geneviève Hélot dit Julien, son épouse, de la ville de Montréal, la jouissance et usufruit d'une terre située, au pied du courant Ste-Marie, près de cette ville, etc.; Item, cinq perches de terre de front, etc., pour, par lesdits Pierre Moreau et son épouse, en jouir, leur vie durant, seulement, à leur caution juratoire, avec injonction expresse que, dans le cas où ledit Pierre Moreau décèderait, et que ladite Geneviève Hélot dit Julien, son épouse, convolerait en secondes noces, elle n'aura plus aucune jouissance des terres ci-dessus, mais, au contraire, seront reversibles, tel que ci-après désigné." "Et quant à la propriété des biens ci-dessus légués en usufruit seulement, elle la donne et lègue aux enfants née ou à naître dudit Pierre Moreau, pour, par eux, en faire, user et disposer en toute propriété, comme bon leur semblera, au moyen des présentes, quand l'usufruit constitué par ces présentes sera éteint et fini." Madame veuve Louis Hélot dite Julien, par son testament du 6 septembre 1819, fit un legs à Pierre Moreau, et son épouse, Geneviève Hélot, et à leurs enfants, dans les termes suivants: "Donne et lègue la testatrice à Pierre

Moreau et Geneviève Hélot dite Julien, son épouse, ses gendre et fille, tous les biens immeubles et immobiliers, de quelque nature et valeur qu'ils puissent être, et en quelques endroits qu'ils soient situés, ainsi que tous les revenus d'iceux, sans aucune exception, échus, et qu'elle délaissera, au jour de son décès, pour, par eux et chacun d'eux, jouir, faire et disposer desdits biens, en usufruit et jouissance, leur vie durant et celle de chacun d'eux seulement, du jour du décès de la testatrice, et, quant à la propriété desdits biens immobiliers ainsi légués en jouissance, auxdits sieur et Dame Moreau, la testatrice la donne et lègue aux enfants nés et à naître du mariage desdits sieur et Dame Moreau, pour, par eux, jouir, faire et disposer desdits biens, en pleine propriété, du jour du décès de leurs dits père et mère, les instituant ses légataires universels, quant aux immeubles." Les deux testatrices décédèrent, l'une en 1816, et l'autre en 1820. Les légataires, Pierre Moreau et Geneviève Hélot, se mirent en possession des biens à eux légués, et les conservèrent jusqu'à leur décès. Geneviève Hélot mourut en 1824, et Pierre Moreau en 1852, laissant deux enfants, savoir Pierre Moreau, actuellement avocat, de la paroisse de Longteuil, et la défenderesse. Pierre Moreau avait eu un autre enfant, George Moreau, qui est mort en 1831. Ce George Moreau était l'époux en premières noces de la demanderesse. Son contrat de mariage contient un don mutuel, et il est mort sans enfants, en sorte que les biens qu'il pouvait avoir, à son décès, revenaient de plein droit à son épouse, la demanderesse." Après la mort de Pierre Moreau, savoir, en 1853, la défenderesse, étant sous l'impression que George Moreau avait hérité de ses grand'mères, en vertu des testaments sus-récités, et qu'il avait transmis ses droits à sa femme, en vertu du don mutuel contenu à leur contrat de mariage, accepta le transport qui sert de base à la présente action, et consentit à payer la rente dont un terme est réclamé. Cette cause a été portée devant la Cour de Circuit, et évoquée par la défenderesse devant la Cour Supérieure. La défenderesse plaide que c'est par erreur qu'elle a consenti au transport de 1853, et, dans la fausse persuasion que George Moreau avait hérité de ses grand'mères, madame veuve Hélot, et madame veuve Moreau, et que, comme héritière de son mari, en vertu du don mutuel contenu dans son contrat de mariage, elle pouvait prétendre à un tiers dans les biens légués par les testaments ci-haut relatés. Elle conclut à ce que l'acte de transport soit déclaré nul; et à ce que l'action soit déboutée. Il est prouvé, par la demanderesse elle-même, et par le témoignage de Glackmeyer, que George Moreau est mort très pauvre, qu'il n'a délaissé aucuns biens, et que la seule considération qui ait

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engagé la défenderesse à consentir la rente mentionnée au transport a été la fausse persuasion dans laquelle elle s'est trouvée, que la demanderesse était propriétaire d'une partie (un tiers) des biens légués par les testaments sus-relatés. La demanderesse a donné trois réponses au plaidoyer des défendeurs. La lère est une réponse en droit. Elle contient 4 motifs: 1° parce que la défenderesse n'allègue rien pour faire voir qu'elle peut, après dix ans, attaquer un acte prétendu fait par erreur; 2° parce que la défenderesse ne fait voir aucune crainte ou cause d'éviction; 3° parce que la bonne foi des parties contractantes n'est pas attaquée dans l'exception de la défenderesse, et parce que, lors même qu'elle le serait, il serait trop tard pour s'en plaindre; 4° parce que la défenderesse n'allègue aucun trouble ni éviction à propos du vice existant à l'époque du contrat. Suit une 2e réponse, dans laquelle la demanderesse, alléguant qu'elle était propriétaire des biens cédés, et niant qu'il y ait eu erreur, prétend que, quand bien même elle n'aurait pas été propriétaire des biens cédés, le transport n'en serait pas moins valable, tant que la défenderesse ne sera pas évincée, ou au moins menacée de l'être; elle invoque, en outre, la prescription de 10 ans. Enfin vient une réponse en fait. Le 31 octobre 1870, jugement a été rendu par le Juge MONDELET, renvoyant l'exception de la défenderesse, parce que cette dernière, après dix ans, ne devait pas être admise à plaider erreur contre l'acte de transport, vu qu'elle n'a pas prouvé qu'elle avait eu connaissance de cette erreur depuis dix ans. Les défendeurs appelèrent de ce jugement, et prétendirent que les deux testaments ci-haut relatés contiennent une substitution en faveur des enfants nés et à naître du mariage de Pierre Moreau et Geneviève Hélot; que, par conséquent, les seuls enfants de Pierre Moreau et Geneviève Hélot, qui aient profité de cette substitution, sont ceux qui vivaient, à son ouverture, savoir, lors du décès du grevé Pierre Moreau, en 1852; que George Moreau, étant mort avant son père, n'a transmis à sa femme aucun droit dans les biens légués par les testaments sus-récités; que la seule cause qui ait engagé la défenderesse à souscrire le transport de 1853, a été les prétendus droits de la demanderesse dans les biens légués par lesdits testaments; que cette erreur est une cause de nullité; entin que l'action de la défenderesse, ou son droit de réclamer la nullité de l'acte de cession de 1853, n'est pas prscrite.

PRÉTENTIONS DE LA DEMANDERESSE: La demanderesse réclame une rente viagère créée par un contrat passé entre elle et la défenderesse (17 mars 1853). La demanderesse a épousé George Moreau, un des légataires en propriété, de ses aïeules, par deux testaments conçus à peu près dans les

mêmes termes, et qui léguaient l'usufruit aux père et mère du dit George Moreau, et la propriété à leurs enfants. G. Moreau, le premier mari de la demanderesse, a survécu aux testatrices. Par son contrat de mariage avec la demanderesse, il a fait don à cette dernière de tout ce qu'il possédait en pleine propriété. Il est décédé après sa mère, légataire en usufruit, mais avant son père, aussi légataire en usufruit. La défenderesse, qui est aussi la sœur de G. Moreau, le premier mari de la demanderesse, et avec lui, légataire en propriété, a fait un contrat avec la demanderesse (17 mars 1857), par lequel cette dernière, au moyen d'une rente viagère de \$200, reversible de de moitié, après son décès, sur la tête de son second mari, s'est désistée de toute prétention dans les propriétés léguées à son premier mari, et à elle données par son contrat de mariage. La défenderesse a toujours payé régulièrement la rente, depuis 1853 jusqu'au 1er février 1870, soit pendant 27 ans, et, lorsqu'elle est poursuivie, elle se refuse de payer sous le prétexte que, les deux testaments ayant créé des substitutions, et George Moreau, le mari de la demanderesse, un des appelés, étant décédé avant son père, le grevé, il n'a existé aucun droit pour lui dans les biens substitués, et, en conséquence, il n'a pu conférer de droit à la demanderesse; que c'est sans cause et par erreur, que la défenderesse a créé en faveur de la demanderesse une rente viagère de \$200; et elle en demande la nullité. La demanderesse répond que les deux testaments ne contiennent pas de substitutions, que son mari George Moreau en était légataire universel en propriété, et que ses droits lui furent acquis dès le jour du décès de ses aïeules, les testatrices; qu'au reste, il est trop tard pour demander la nullité du transport et cession, et que l'action, comme l'exception en nullité, sont prescrites. La défenderesse, pour échapper à cette prescription, a prétendu n'avoir eu connaissance que récemment de la nullité de l'acte; mais elle n'a pas établi quand l'erreur lui avait été dévoilée, et sa simple affirmation, dans l'exception, ne suffirait pas, en supposant que l'erreur de droit pût servir de base à une action de nullité. Diverses questions de droit sont soulevées dans cette cause: 10 Il n'y a pas de Substitution: Thévenot d'Essaulle (éd. Mathieu), Substitution, p. 4, § 2, nº 7: "Vraie définition: Après y avoir longtemps réfléchi, je crois que la substitution fidéi-commissaire doit être définie, une disposition de l'homme, par laquelle, en gratifiant quelqu'un expressément ou tacitement, on le charge de rendre la chose à lui donnée, ou une autre chose, à un tiers que l'on gratifie en second ordre. On le charge de rendre à un tiers." C'est le caractère principal de la substitution fidéi-commissaire. C'est ce qui distingue la fidéi-commissaire de la directe, différence expliquée à la page

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8, et qui n'existe pas ici non plus. La substitution directe consiste à instituer un tel héritier, et, s'il n'est pas son héritier, un tel autre. La suspension du legs de la propriété, durant la jouissance, n'interrompt pas la substitution. Id., p. 79, n° 229. Dans la substitution, la propriété réside en la personne du grevé, Id., p. 171, nºs 555, 576, 582, 584. Guyot, vo Substitution: "Pour qu'il y ait substitution, il faut que les termes emportent le trait de temps," p. 493. Id., p. 491: "Une autre condition essentielle pour établir un fidéicommis, est que les termes dont on se sert pour l'exprimer emportent l'ordre successif ou le trait de temps, c'est-à-dire, qu'ils n'appellent le substitué qu'en second ordre, et après que l'institué ou donataire immédiat aura recueilli." Art. 925 C.C. "Il y a deux sortes de substitutions. La substitution vulgaire est celle par laquelle une personne est appelée à la disposition, pour le cas où elle est sans effet quant à la personne avantagée au premier lieu. La substitution fidéi-commissaire est celle où celui qui recoit est chargé de rendre la chose, soit à son décès, soit à un autre terme. La substitution a son effet en vertu de la loi, à l'époque fixée, sans qu'il soit besoin d'aucune tradition ou autre acte de la part de celui qui est chargé de rendre." Art. 928 C. C. "Une substitution peut exister quoique le terme d'usufruit ait été employé pour exprimer le droit du grevé. En général c'est d'après l'ensemble de l'acte et l'intention qui s'y trouve suffisamment manifestée, plutôt que d'après l'acception ordinaire de certaines expressions, qu'il est décidé s'il y a ou non substitution." Art. 936 C. C. "Les enfants qui ne sont point appelés à la substitution, mais qui sont seulement mis dans la condition sans être chargés de restituer à d'autres, ne sont pas regardés comme étant dans la disposition." Furgole, Traité des Testaments, tome 2, p. 33: "Mais si la première institution avait été bornée à une chose particulière, comme si le testateur avait dit : j'institue ma femme en l'usufruit pendant sa vie; et après sa mort j'institue Sempronius, le second institué devenait véritable héritier dès le moment de la mort du testateur, parce qu'il était seul héritier universel. Voilà pourquoi le temps apposé devrait être rejeté suivant le principe renfermé dans la § 9, aux instit. de hæred. instit. et la femme instituée en l'usufruit, et par conséquent in re certa, ne pouvait être considérée que comme légataire de l'usufruit." Coin Delisle, Donations et Testaments, p. 64, sur l'art. 899 : "La loi défend aussi de confondre avec les substitutions prohibées la disposition par laquelle le donateur ou le testateur donne a L'UN l'usufruit, et la nue propriété a L'AUTRE. L'usufruit est une qualité des biens que la loi permet de démembrer de la propriété pour en faire l'objet d'une disposition ou d'une convention distincte de celles établies sur le fonds même.

Dans le don de la nue propriété et de l'usufruit à deux personnes différentes, il y a donc deux dispositions également directes, également indépendantes, produisant simultanément effet au profit de chaque personne gratifiée: on ne voit là ni l'alternative qui constitue la substitution vulgaire, ni les deux libéralités successives qui se trouvent dans la fidéicommissaire." SECONDE QUESTION: La demande en nullité est prescrite. Art. 2258 C. C.: "L'action en restitution des mineurs pour lésion ou pour réformation des comptes rendus par le tuteur et celle en rescision de contrat pour erreur, fraude, violence ou crainte, se prescrivent par dix ans. Ce temps court dans le cas de violence ou de crainte, du jour où elles ont cessé; et dans le cas d'erreur ou de fraude du jour où elles ont été découvertes." La preuve de la découverte incombe à la défenderesse: Duranton, tome 12, n° 536. "Mais si l'action est intentée après les dix ans qui ont suivi le contrat, et que le défendeur prétende qu'elle est maintenant non recevable, ce n'est point à lui, quoique demandeur dans son exception (reus excipiendo fit actor), à prouver que la violence a cessé ou que l'erreur ou le dol ont été découverts depuis plus de dix ans; c'est au contraire au demandeur à établir qu'il y a moins de dix ans, et qu'il est en conséquence encore dans le délai utile pour agir. Comme demandeur, il doit non seulement prouver le fait sur lequel il fonde son action, mais encore qu'il est dans le délai utile pour l'exercer; il doit prouver ce qui a prolongé la durée de ce délai, qui, en principe, est de dix ans à partir du contrat. Ce n'est pas là l'obliger indirectement à prouver une négation, savoir, qu'il n'a pas acquis sa liberté, ou qu'il n'a pas découvert le dol ou l'erreur avant telle époque; c'est l'obliger au contraire à prouver un fait positif, qu'il a acquis sa liberté, ou qu'il a découvert le dol ou l'erreur à tel jour, qui n'a pas précédé de plus de dix ans celui où il a formé sa demande en nullité." Troplong, Prescription, nº 926: "Mais si l'erreur consiste en droit, elle ne peut pas servir d'excuse. Paul a écrit avec infiniment de sens cette règle de droit qui n'est jamais trompeuse: Nunquam in usucapionibus juris error possessoribus prodest." Art. 2206 C. C.: "Les tiers acquéreurs de bonne foi, avec titre translatif de propriété venant soit du possesseur précaire ou soumis à un domaine supérieur, soit de tous autres, peuvent prescrire (par dix ans) contre le propriétaire durant le démembrement ou la précarité. Les tiers peuvent aussi prescrire contre le propriétaire durant le démembrement ou la précarité par trente an avec ou sans titre." Art. 2251 C. C.: "Celui qui acquiert de bonne foi et par titre translatif de propriété, un immeuble corporel, en prescrit la propriété et se libère des servitudes, charges et titr etc. lière deva est, dan tare une inté chos ďun son pren laqu équi cont sion de l était la d cessé pouv vala s'est soier est n conv que . caus ne c cript diffé pres dire com Vali la m puta poss le p que men

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et hypothèques par une possession utile en vertu de ce titre (pendant dix ans)." Solon, Nullité, tome 2, n° 462, etc.: "On sent que si toutes les actions personnelles, mobilières ou réelles, ont dû être soumises à la prescription, on devait, à plus forte raison, y soumettre l'action en nullité qui est, le plus souvent, odieuse, et qui, lorsqu'elle ne l'est pas dans l'origine, finirait par le devenir, si elle était exercée trop tard." Id., nº 467: "Lors donc qu'on est à même de décider une question relative à une action en nullité que la partie intéressée dit avoir été couverte par prescription, la première chose à examiner, c'est, si la partie qui demande la nullité d'un acte a figuré dans cet acte, soit par elle-même, soit par son représentant légal, si elle n'y a pas été partie. Au premier cas, son silence pendant dix ans, depuis l'époque à laquelle elle a connu ou dû connaître la cause de la nullité. équivaut à ratification de son engagement." Id., nº 476: "Au contraire, la prescription de l'action en nullité ou en rescision commence à courir le jour du contrat, lorsque la cause de la nullité était connue ou censée l'être, et si la nullité était ignorée, ou si la partie n'était pas libre, du jour de la découverte du moyen, ou du jour où la contrainte a cessé." Idem, nº 493 : "Le silence gardé par la partie qui pouvait invoquer l'action en nullité ou en rescision, n'équivalant à ratification, et ne validant un titre qu'autant qu'il s'est continué pendant dix ans, il faut que ces dix années se soient écoulées utilement, et dans leur entier, c'est-à-dire qu'il est nécessaire que tous les jours dont elles se sont composées, la convention ou l'acte ait pu être confirmé ou ratifié, si bien que si pendant deux ou plusieurs jours il y avait eu une des causes ordinaires de suspension de prescription, ces jours ne ne compteraient pas." Toullier, tome 7, no 605: "La prescription de l'action en restitution est donc essentiellement différente de la prescription par dix ou vingt ans. C'est une prescription qui a un objet particulier." Id., nº 604: "Il faut dire que le délai de dix années accordé pour la restitution commence à courir du jour du contrat." TROISIÈME QUESTION : Validité de l'acte: "Toullier, t. 7, nos 29, 30, 31. 29. "Par la même raison, les transactions passées avec le propriétaire putatif et avec l'héritier apparent, concernant la chose qu'il possède, doivent être valides et produire leur effet, soit contre le propriétaire rentré dans ses droits, soit en sa faveur." N° 31: "Tels sont les motifs d'ordre et d'intérêt, tant public que particulier, qui ont fait établir la maxime que les paiements faits à l'héritier apparent ou putatif sont valides; que les véritables héritiers sont liés par les jugements rendus contre lui, par les transactions ou traités passés avec lui. Ils s'en plaindraient à tort : ils ont à s'imputer de ne s'être pas présentés plus tôt. S'ils ignoraient l'ouverture de la succession, c'est une ignorance qui peut le plus souvent leur être imputée, et dont, en tous cas, les suites ne doivent retomber que

sur eux, et non sur des tiers de bonne foi."

PRÉTENTIONS DE LA DÉFENDERESSE : Les testaments ci-haut récités contiennent une substitution en faveur des enfants. nés et à naître, des dits Pierre Moreau et Geneviève Hélot. Ces testaments contiennent de deux choses l'une, soit un simple legs d'usufruit, en faveur de Pierre Moreau et sa femme. et un legs de propriété en faveur de leurs enfants nés et à naître, ou bien une subtitution. Et l'opinion des défendeurs est qu'il y a substitution. Notre droit est très favorable aux substitutions, c'est le vieux droit de la France. avant qu'il ne fût modifié par l'ordonnance de 1747. Cette ordonnance défendait toutes conjectures, il fallait, suivant elle, que la substitution fût expresse, pour qu'elle fût reconnue. Thévenot d'Essaulle, sur ordonnance de 1747, nº 255, 256: "Antérieurement à cette ordonnance, tout ce qui pouvait indiquer que le subst'tuant avait entendu conserver les biens dans la famille, et surtout dans l'agnation, était accueilli, et contribuait à faire regarder le père comme grevé envers ses enfants, bien qu'il n'y eût rien dans la disposition qui emportat nécessairement cette conséquence." Thévenot d'Essaulle, sur ord. de 1747, nº 257. Il faut étudier avec beaucoup de réserves les auteurs qui ont écrit depuis cette ordonnance, et, surtout, les auteurs qui ont écrit depuis le Code Napoléon, car on sait que ce dernier a un article qui prohibe, à quelques exceptions près, les substitutions. Ces auteurs, d'après l'esprit de leur loi, décident, dans tous les cas qui sont douteux, qu'il n'y a pas substitution. Tenons-nous-en à notre vieux droit français, n'attachons pas trop d'importance aux mots mêmes dont s'est servi le testateur, mais recherchons son but et son intention. L'article 928 de notre Code Civil, se faisant l'écho du droit antérieur, nous dit qu'une substitution peut exister, quoique le terme d'usufruit ait été employé; qu'il faut rechercher le but, l'intention du testateur pour décider s'il y a substitution. N'appert-il pas, par les deux testaments ci-haut relatés, que les testatrices voulaient que leurs biens fussent conservés pour les enfants nés et à naître, du mariage de Pierre Moreau et Geneviève Hélot; mais que la propriété ne leur parvînt qu'à la mort de leurs parents. Voyons le testament de Marie Marare de 1816: "Et quant à la propriété des biens ci-dessus légués, en usufruit seulement, elle la donne et lègue aux enfants nés et à naître de Pierre Moreau, pour, par eux, en faire, user et disposer en toute propriété, comme bon leur semblera, au moyen des présentes," et la testatrice ajoute: "quand l'usufruit constitué

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par ces présentes sera éteint et fini." Nous lisons également dans le testament de madame veuve Hélot (1810): "Et, quant à la propriété des dits biens, ainsi légués en jouissance aux dits sieur et dame Moreau, la testatrice la donne et lègue aux enfants nés et à naître des dits sieur et dame Moreau, pour. par eux, en jouir, faire et disposer des dits biens en pleine propriété," et la testatrice ajoute : " du jour du décès de leurs père et mère." Ne résulte-t-il pas de ces deux testaments, que les testatrices n'ont voulu donner la propriété de leurs biens, qu'à commencer du décès de leurs père et mère? D'ailleurs, le but évident des testatrices était de faire parvenir leurs biens aux enfants nés et à naître de Pierre Moreau et de sa femme. Nous sommes d'accord sur ce point. Or, sur la tête de qui aurait reposé la propriété de ces biens, si, au décès des testatrices. Pierre Moreau et sa femme n'eussent eu aucun enfant? Le legs en propriété serait, diront peut-être nos adversaires, devenu caduc. Nous répondrons alors que le but des testatrices, d'après cette interprétation, aurait été manqué. La propriété des biens ne serait pas parvenue aux enfants de Pierre Moreau et de son épouse, mais serait devenue la propriété exclusive des héritiers légaux des testatrices. La même question a été décidée par le juge BERTHELOT, dans une cause de Lussier vs Patenaude. Marcadé traite également cette question dans son commentaire sur l'art. 890, et décide que, chaque fois que le legs en propriété est fait à des enfants à naître, il y a substitution. Si les testaments contiennent une substitution, les seuls enfants de Pierre Moreau et son épouse, vivant au décès de leur père, en 1852, ont une part des biens légués par ce testament, et George Moreau, qui est mort longtemps avant son père, n'a pas pu transmettre à sa femme, son héritière, des droits qui n'étaient pas encore ouverts. Or, à la mort de Pierre Moreau, en 1852, il n'y avait de survivants que deux enfants, savoir, Pierre Moreau, avocat, de Longueuil, et la défenderesse, et, dès ce moment, ils sont devenus propriétaires d'une moitié indivise des dits biens. Les biens légués en vertu des testaments sus-relatés ont été la seule considération du transport de 1853, car il est de preuve que George Moreau est mort pauvre et sans délaisser de biens, en outre, le soin que l'on a pris, au contrat, de relater les testaments, montre qu'ils étaient la base de la transaction. Ainsi, en achetant les droits que la demanderesse avait, en vertu des testaments susdits, la défenderesse agissait sous l'empire d'une erreur de droit, et achetait son propre bien, or l'achat de son propre bien était nul avant le code, tout comme l'achat de la chose d'autrui est nul en vertu de notre code. Il n'est pas nécessaire qu'il y ait trouble et éviction dans ce cas, pour invoquer la

nullité de l'acte, parce qu'étant elle-même en possession des biens qu'elle avait acquis par le transport de 1853, elle n'a pas pu être à elle-même une cause d'éviction. Le transport est donc nul pour moitié, parce que la moitié du bien que la défenderesse a achetée lui appartenait, or, suivant l'art. 1517 de notre code, et suivant Pothier, quand l'acheteur est évincé (ici la nullité de la vente équivaut à l'éviction) d'une partie de la chose vendue, et que cette partie est néanmoins de telle conséquence, relativement au tout, qu'il n'eût pas acheté sans cette partie, l'acheteur peut faire rescinder la vente. Donc, le contrat étant nul pour moitié, la défenderesse peut demander la nullité du tout, d'autant plus que l'autre moitié des biens cédés ne lui appartenait pas, mais appartenait à Pierre Moreau, avocat. En vain nous opposerait-on cette disposition du droit antérieur à notre code qui concerne la vente des droits successifs, et qui n'oblige le vendeur qu'à la garantie de l'existence de la succession. Cette disposition est ainsi formulée à la page 68, n° 96, du rapport de nos codificateurs, au titre de la vente, comme étant le droit existant alors. "Celui qui vend quelque droit successif sans spécifier en détail les biens dont il se compose, n'est tenu de droit qu'à garantir l'existence de la succession," d'où il faut conclure que, quand les biens et droits, comme dans ce cas-ci, sont détaillés, le vendeur est tenu à la garantie de chacun d'eux. Cette doctrine est conforme à la vieille maxime tirée du droit romain: "Quanta autem hæreditas est, nihil interest nisique substantia ejus affirmaverit venditor." C'est aussi la doctrine de Duvergier, vente, vol. 2, n° 308, et celle de Delvincourt, note, t. III, page 174. D'ailleurs, la vente d'une chose appartenant à l'acheteur est absolument nulle, comme nous l'avons dit, et n'est pas seulement annulable, et, comme cette nullité s'applique à une partie très considérable du contrat, il s'ensuit que nous avons le droit de demander la nullité de tout le contrat. Il importe peu que l'erreur dans laquelle la défenderesse a été, soit une erreur de fait ou une erreur de droit, dans l'un et dans l'autre cas, il y a lieu à demander la nullité (Larombière, Théorie et Pratique des obligations: Commentaires sur art. 1110, nº 22, arrêt de la Cour de Besançon). La défenderesse est bien fondée à demander la nullité de l'acte, si toutefois son droit n'est pas prescrit, ainsi que le prétend la demanderesse. L'art. 2258, sur lequise fonde la demanderesse, n'est que la reproduction de l' donnance de 1510, art. 49, et de celle de 1539, art. 13 Or ces ordonnances ne s'appliquent pas au cas actuel. Nous pouvons consulter, avec sûreté, les commentateurs français sur l'art. 1304 du C. N. Cet article est beaucoup plus sévère que le nôtre ; cependant les commentateurs disent formellement

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que, "lorsque la nullité d'une obligation repose sur un vice inhérent à sa cause ou à son objet, l'art. 1304 cesse alors d'être applicable, et l'action n'est prescrite que par trente ans. LaRombière, loco citato, Marcadé, sur art. 1304, au par. 9, nº 883. Le même auteur, LaRombière, dans son commentaire sur l'art. 1131, au n° 2, nous explique clairement ce que c'est que la cause d'une obligation: "Dans le contrat à titre onéreux, je m'oblige en vue de ce que l'autre partie s'oblige de donner." "L'objet de son obligation est la cause de la mienne." Puis il ajoute, au n° suivant: "L'existence d'une cause est essentielle à la validité de toute obligation. Pas de différence, dit-il, quant à l'effet, entre un contrat sans cause et un contrat à cause fausse, n° 5." La cause de l'obligation de la défenderesse envers la demanderesse, l'objet de l'obligation de cette dernière, ce sont les prétendus droits réclamés, à elle acquis en vertu des testaments sus-récités. Or, ces droits, non seulement n'appartenaient pas à la demanderesse, mais appartenaient à la défenderesse; donc il y avait cause fau-se, il n'y avait pas de cause. Le vice de ce contrat est donc inhérent à la cause et à l'objet du contrat, et nous disons, avec La Rombière, Marcadé et les commentateurs les plus judicieux, que ce vice n'est pas purgé par la prescription de dix ans, mais bien par trente ans. Dans le droit ancien, la vente d'une chose appartenant à l'acheteur, était nulle, comme l'est aujourd'hui la vente du bien d'autrui en général; or la vente du bien d'autrui est absolument nulle, et l'art. 1304 du Code Napoléon ne s'applique pas à ce cas. Marcadé sur art. 1599 C. N., par. III. Appliquant le même raisonnement au cas actuel, nous pouvons dire que la vente d'un bien appartenant à l'acquéreur est absolument nulle, et que le vice de ce contrat ne peut pas être purgé par la prescription de 10 ans, et le droit de la défenderesse de faire déclarer nul l'acte de cession et transport de 1853 n'est pas prescrit. Le jugement est en outre erroné parce qu'il n'adjuge pas sur la réponse en droit (demurrer) produite par la demanderesse. Ce demurrer se trouve implicitement renvoyé par le jugement, puisque l'exception de la défenderesse est renvoyée sur le principe que le droit d'attaquer l'acte est prescrit, puisque cette prescription d'est invoquée que par une seconde réponse, et que le juge n'a pas pu adjuger sur la seconde réponse, sans disposer de la première.

RÉPONSE DE LA DEMANDERESSE AUX AUTORITÉS DE LA DEFENDERESSE: Art. 1517 C. C. donne l'action rescisoire à celui qui est évincé. Cette action doit être intentée dans les dix ans. Art. 2258: Pothier, Vente, n° 144. Même chose que l'art. 1517 C. C. Art. 1579 C. C.: "Celui qui vend quelque droit successif sans spécifier en détail les biens dont il se

compose, n'est tenu de garantir que sa qualité d'héritier." Or il y a spécification de biens dans l'acte en question, et la garantie devenait pour lors inutile. La présomption est, et du reste l'acte le dit, que les parties savaient bien ce qu'elles faisaient. Dans le projet du Code, il y avait du doute s'il ne fallait pas garantir l'existence de la succession plutôt que la qualité d'héritier. Mais l'une ou l'autre garantie n'était nécessaire que s'il y avait absence de spécification de biens." Duvergier, Vente, tome 2, n° 308, explique qu'alors ce n'est plus la qualité d'héritier qui doit être garantie, mais que les biens spécifiés sont de fait dans la succession. Delvincourt, tome 3, p. 174, notes. La spécification donne lieu à l'éviction de la part de celui qui a droit dans les biens spécifiés. Mais Delvincourt ne dit pas quand il doit l'exercer. Il faut toujours qu'il prouve qu'il a droit. Toutes les autorités citées, telles que La Rombière, pour dire que l'erreur ne se prescrit que par 30 ans, ne s'appuient que sur les termes de l'art. 1304 du Code Napoléon, lesquels diffèrent de ceux de l'art. 2258 de notre Code Civil, en ce sens que la rescision pour erreur n'est pas accordée dans l'art. 1304. Une confrontation fera voir la différence dans le premier paragraphe des deux Codes. Marcadé, sur l'art. 1304, n° 879, constitue la défenderesse actor dans sa demande en nullité, laquelle se prescrit par dix a:... Id., sur l'art. 1599, IV: "Enfin la prescription, même celle de 10 et 20 ans, court au profit du possesseur, non parce qu'il y a vente, mais parce qu'il y a chez lui bonne foi et titre apparent; s'il y avait vente il serait propriétaire, et dès lors pas besoin de prescription." A l'argumentatian la défenderesse a admis que c'était à elle à faire la preuve de la découverte de l'erreur et de son époque. Cette admission règle toute la cause: l'art. 2258 est là pour donner la prescription de 10 ans, et tous les auteurs disent qu'en l'absence de cette preuve, la prescription court du jour de l'acte.

JUGEMENT DE LA COUR SUPÉRIEURE, DU 31 OCTOBRE 1870, PRONONCÉ PAR L'HON. JUGE MONDELET: "La Cour, considérant que les demandeurs ont fait preuve des allégations essentielles de leur déclaration, et nommément, que les défendeurs leur doivent la somme de cent cinquante dollars, pour les causes et raisons énoncées en leur demande et intérêts. Considérant que les défendeurs sont non recevables à se faire relever des obligations qu'a contractées la défenderesse envers la demanderesse, par l'acte de transport du dix-septième jour de mars 1853, invoqué par la demande et par la défense, et ce, attendu que, depuis la confection et passation du dit acte, du dix-sept mars 1853, il s'est écoulé au delà de dix ans, et que la défenderesse n'a allégué ni prouvé aucun fait ni établi aucune cause qui puisse donner lieu maintenant à

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Ta Il s'a confii l'inte tier." Or mettre de côté et annuler le dit acte du dix-sept mars 1853. et la relever des obligations qu'elle a contractées envers la cion, et la demanderesse, suivant qu'elle prétend par son exception est, et du péremptoire, la Cour déboute l'exception péremptoire susdite. ce qu'elles ate s'il ne En conséquence, la Cour condamne la défenderesse à payer aux demandeurs la somme de cent cinquante dollars, avec tôt que la intérêt sur cinquante dollars à compter du vingt-cinq février tait nécesens." Du-1870, jour de l'assignation, sur cinquante dollars à compter du vingt-un mai 1870, et sur cinquante dollars du sept septembre n'est plus 1870, dates respectives de la réception de chaque demande e les biens supplétoire." rt, tome 3, La Cour Supérieure - Greant à Montréal comme Cour de tion de la Mais Del-Revision, confirme le div jugement. (2 R. L., p. 715) Doutre, Doutre et Doutre, pour la demanderesse. t toujours LEBLANC, CASSIDY ET LACOSTE, pour la défenderesse. , telles que it que par

EXECUTION IN HANDS OF THIRD PARTIES.

COURT OF QUEEN'S BENCH, Montreal, 24th June, 1873.

Coram DUVAL, Ch. J., DRUMMOND, J., BADGLEY, J., MONK, J., TASCHEREAU, J.

Brossard, Appellant, and Tison et al., Respondents.

Held :- That a seizure effected in the hands of a third party, who does not object, is valid, and that the actual consent of such third party to the seizure is unnecessary; his failure to object being of itself sufficient.

This was an appeal from a judgment rendered by the Court of Review, at Montreal, on the 28th of June, 1872, confirming a judgment of the S. C., at Montreal, rendered on the 26th of April, 1872, by which a seizure in the hands of a third party was declared to be illegal, because it had not been proved that such third party had consented to the seizure. The Court of Appeal (Duval, Ch. J., and Drummond, J., dissentientibus on the ground that no fraud had been proved) held. that art. 553 of the Code of C. P. rendered such a seizure valid, if the party on whom the seizure was made did not object, and that no proof of actual consent to the seizure was necessary, and further held that the title of respondent was moreover fraudulent, and reversed both judgments.

TASCHEREAU, J., who delivered the judgment of the Court: Il s'agit d'un appel d'un jugement de la Cour de Revision, confirmant celui de la Cour Supérieure, qui avait maintenu l'intervention des opposants produite sous les circonstances

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our, consiallégations les défenllars, pour et intérêts. s à se faire esse envers tième jour défense, et u dit acte, dix ans, un fait ni

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suivantes: Le dix octobre 1870, le défendeur vendit aux intimés un fonds de magasin d'épiceries dont ils prirent possession, ainsi que du magasin lui-même, et, le 12 du même mois, un acte de vente fut exécuté, pour constater cette vente, à raison de 17s. 6d. dans le louis, mais le 13, le demandeur, au moyen d'un bref de saisie-arrêt avant jugement, fit saisir tous les effets en question, comme appartenant au nommé Poupart, et cela sans opposition de la part des intimés. De là intervention de la part des intimés, réclamant la mainlevée de la saisie comme illégale, et comme propriétaires des effets saisis? Il s'élève deux questions, dont une de savoir si la saisie était nullle de plano, par le fait seul qu'elle avait eu lieu d'effets en possession des intimés, et l'autre de savoir si les intimés avaient, de bonne foi, fait l'acquisition des effets ci-dessus mentionnés. Le jugement dont est appel n'exprime pour motif que celui-ci, savoir : que, lors de la saisie, les intimés étaient en possession des effets, et que la saisie a été pratiquée sans leur consentement, et il n'a été nullement question de savoir si l'acquisition des intimés était ou non entachée de mauvaise foi. Le jugement assume donc que, pour autoriser une saisie d'effets, comme appartenant à un défendeur, mais en la possession de facto d'un tiers, il faut que ce tiers ait donné un consentement formel à cette saisie. Ce motivé est contraire à l'article 553, qui permet de saisir les effets d'un débiteur en la possession actuelle d'un tiers, si ce dernier n'y objecte pas, autrement le créancier n'a que la voie de saisie-arrêt en mains tierces. Les intimés prétendent que leur si'ence seul, sans leur consentement formel, ne suffit pas pour légaliser la saisie et soulever la question de propriété. Je crois qu'ils ont tort, car l'article est clair et positif, non susceptible d'une double interprétation, et il suffit de prouver leur manque d'objection, ce qui est le cas en la présente cause; d'ailleurs, la saisie a eu lieu au domicile du defendeur, qu'il n'avait quitté que depuis un instant. J'avoue que la pratique jusqu'ici a été contraire, mais nous voici avec un texte du Code de Procédure positif, qui, suivant moi, indique la non nécessité de ce consentement formel, et que l'absence d'objection est et doit être considérée comme acquiescement. L'appelant a appuyé sa prétention dans ce sens d'autorités des plus respectables tirées de Roger, Dalloz, Carré, qui toutes ne font pas question de l'affirmative, surtout lorsqu'il y a fraude. Je ne vois pas, en thèse générale, que la position du tiers soit empirée par la saisie des effets, et je n'aperçois qu'une légère différence entre la position que lui fait la saisie-arrêt, et celle que lui fait une saisie-exécution pure et simple. En l'un et l'autre cas, la question de propriété s'élèvera sur la contestation de la déclaration du tiers-saisi, si

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le demandeur a pris la voie de la saisie-arrêt, comme elle s'élèvera sur la saisie-exécution, si le tiers ne s'y objecte pas. Pourquoi forcerions-nous le texte de l'article 553 du C. P. C. pour dire qu'il faut un consentement formel? La 2e question qui est celle du titre de propriété des intervenants, et sur laquelle la Cour Supérieure et la Cour de Revision se sont abstenues de se prononcer, ne présente guère plus de difficulté. En effet, la vente de ce fon ls de magasin a eu lieu sous des circonstances tellement suspicieuses qu'elles la rendent nulle comme entachée de fraude. Lors de cette vente, le défendeur était insolvable, poursuivi et sous le coup du jugement, et à la connaissance personnelle de l'un des intimés. Cependant, c'est à la faveur des ténèbres de la nuit que l'on procède d'abord à un inventaire des effets que l'on vend, et sur lesquels on paye de suite \$200, qui passent entre les mains du père du défendeur, et on enlève tous les autres de suite pour les transporter ailleurs. Tous ces faits sont prouvés par l'un des intervenants, qui avoue assez naïvement qu'il a pris le conseil d'un avocat avant de faire cette acquisition, mais que ce conseil était contraire à ce qu'il voulait faire, que, néanmoins, il n'a pas suivi les avis de cet avocat, et a fait la transaction dont il s'agit. Il y a plus. L'intervenant Tison, dans un but que je ne puis bien apprécier, ayant rencontré ce même avocat, dans l'après-midi du jour de la transaction, a fait usage de mensonge, et a déclaré avoir renoncé au marché, lorsqu'il venait de le conclure le matin même. Sur ce fait comme sur les autres, nous avons ce que j'appellerai confitentum reum. Maintenant, il suffit de reférer à l'acte de faillite de 1869, pour se convaincre de l'illégalité et nullité d'une vente de l'espèce de celle qui a eu lieu en cette cause. Les sections 86, 88, 89 et suivantes de cet acte peuvent être lues avec avantage. La section 87 prononce formellement la nullité d'une telle vente. J'opine pour l'infirmation du jugement.

The reasons assigned in the judgment were as follows: "The Court, considering that the purchase by respondents, intervenants below, from defendant, under and by virtue of the deed of sale between them, dated the twelfth day of October, 1870, passed before Montpetit, public notary, of the goods, chattels and effects seized and attached, under and by virtue of the writ of saisie-arrêt issued, at the suit of appellant, plaintiff, contestant below, was made at a time when defendant was insolvent and unable to meet his liabilities, to the knowledge of intervenants, and that the said deed of sale, and the purchase therein and thereby, were fraudulent and collusive, between the parties to the said deed of sale and purchase, and in contravention of law; considering that the said deed of sale and the purchase thereby should there-

fore be rescinded and annulled; and considering that the intervention fyled herein by respondents, is unfounded, and contrary to law, and that the said goods, chattels and effects, did not vest in the *intervenants* any legal right or property in the said goods, chattels or effects." Judgments of Courts below reversed. (18 J., p. 54)

JETTÉ & ARCHAMBAULT, for appellant. TRUDEL & TAILLON, for respondent.

CONTRAINTE PAR CORPS.

COURT OF QUEEN'S BENCH, Montreal, 24th June, 1873.

Coram Duval, Ch. J., Drummond, J., Badgley, J., Monk, J., Taschereau, J.

ROGERS et al., Appellants, and SANCER et al., Respondents.

Held:—That where the Court is satisfied that the fraud charged, in an action under the 92nd section of the Insolvent Act of 1869, has been proved, the insolvents will be ordered to be imprisoned in default of payment of costs as well as of the debt.

This was an appeal from a judgment of the Superior Court, at Montreal, (TORRANCE, J.) rendered on the 28th of June, 1872, in an action brought by appellants, creditors of respondents, under the 92nd sec. of the Insolvent Act of 1869. The demand in the action for the imprisonment of respondents was rejected, on the ground that the fraud charged had not been proved. The Court of Appeal thought otherwise, and reversed the judgment and ordered the imprisonment, in default of payment of the debt, and costs. It had been urged, that, inasmuch as the clause in the Act allowed the imprisonment in the case of the non payment of "the debt, or costs," the judgment should be limited to either one or the other, and should not embrace both; but the Court considered that this word "or" must be held to mean "and."

Monk, J. (dissentiens), said he would scarcely have entered a dissent from the judgment, were it not that he found himself in perfect accord with the judgment of the Court below which the Court was going to reverse. The action was brought under the 92nd section of the Insolvent Act, which provides for the imprisonment of any trader purchasing goods while in a state of insolvency, knowing that he has not the means of paying for them. The conclusions of the declaration asked that defendants be condemned to pay the debt; and, further, that, by the judgment to be rendered

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defendants be adjudged to have been guilty of fraud, and to be imprisoned in the common jail, for such time not exceeding two years, as the Court might order, unless the debt and costs be sooner paid. The judgment appealed from held defendants liable for the debt, but, considering that there was no intention to defraud, dismissed the conclusions for imprisonment. His Honour agreed with this decision, and did not think that the money condemnation and imprisonment must necessarily go together.

DRUMMOND, J. (also dissentions), held that the judgment was wrong, even in condemning the defendants to pay the debt, as that would be interfering with the province of the Insolvent Court before which the case was for the winding up of the insolvents' estate. The defendants had, perhaps, brought themselves within the letter of the law, but not within the intent and spirit. They were not lavish in their expenditure, and no doubt, at the time they purchased the

goods, had hopes of being able to pay for them.

BADGLEY, J., said the creditors had appealed from the judgment of the Court below, and called upon this Court to sustain the judgment of the Superior Court, as to the money condemnation, and, at the same time, to add to the judgment the imprisonment which had been omitted. The Court found that the conduct of respondents had been so flagrantly illegal that they could not escape the penalty of the insolvent law. The judgment would, therefore, be corrected, and imprisonment ordered. The cross appeals of defendants would be dismissed.

TASCHEREAU, J.: Les appelants, demandeurs en Cour Supérieure, ont poursuivi les défendeurs, Edmond Sancer et Guillaume Sancer, pour \$2320.37, pour marchandises vendues et livrées, et pour lequel montant, les intimés avaient donné leur billet promissoire, et, en outre, des conclusions ordinaires, à l'effet d'obtenir une condamnation pour ce montant, contre les défendeurs Sancer, ils demandèrent pour qu'ils fussent déclarés coupables de fraude, et passibles d'un emprisonnement de deux ans, sur le principe qu'à l'époque où ils avaient contracté la dette, ils étaient insolvables, savaient qu'ils étaient insolvables, et que c'était avec intention de frauder les appelants qu'ils en avaient acheté les effets et marchandises susdites à terme. Les défendeurs ont nié toutes les allégations de la demande, et le jugement dont est appel comme rendu le 20 septembre 1872, les a condamnés simplement à payer les \$2,320.37, avec intérêt, et dépens, et a renvoyé les conclusions de la déclaration des demandeurs relatives à la contrainte par corps; les motifs sont que les allégations des demandeurs à cet égard n'avaient pas été

C'est de cette dernière partie naturellement que les appelants se plaignent. Ils allèguent qu'en vertu de la section 92 de l'acte de faillite de 1869, "toute personne qui " achète des effets à crédit ou qui obtient des avances d'argent "se sachant ou croyant incapable de faire honneur à ses "engagements, et cachant ce fait à la personne devenant " ainsi son créancier, dans l'intention de frauder cette per-" sonne, ou qui sous tous faux prétextes obtient crédit pour le " paiement de quelque avance ou prêt d'argent, ou du prix " ou d'une partie du prix de certains effets ou marchandises, "dans l'intention de frauder la personne devenant ainsi son "créancier, et qui n'aura pas ensuite payé la dette ou les " dettes ainsi encourues, sera réputée coupable de fraude, et " passible de l'emprisonnement n'excédant pas deux ans, à " moins que la dette ou les frais ne soient plutôt acquittés." Les demandeurs reprochent aux Intimés d'avoir contracté leur dette à leur égard sous les circonstances ci-dessus, savoir, sachant qu'ils étaient insolvables et incapables de la rencontrer, et qu'ils ont caché ce fait aux appelants leurs créanciers. L'enquête prouve que la dette a été contractée peu de temps avant la cession de biens que les Intimés ont faite à un Syndic, il est établi et admis que les intimés ne tenaient plus de livres depuis le 31 décembre 1869, dernière époque où la feuille de la balance a été établie pour la dernière fois, et alors ils se trouvaient avec un déficit de \$1400; que, malgré cela, ils ont continué leur commerce, achetant et vendant, mais avec un résultat tel qu'à leur cession ils se trouvaient avec un déficit variant de \$30 à \$37,000, et cela sans avoir fait de pertes extraordinaires. Les intimés reconnai-sent tout cela, mais disent en justification qu'ils n'ont eu aucune intention de frauder, qu'ils connaissaient bien leur situation précaire, mais qu'ils espéraient pouvoir se relever, sans pourtant assigner aucune raison pour justifier cet espoir. A la plaidoirie orale, et par les factums des parties, il a été soulevé ces questions. 1° Les appelants, demandeurs en Cour Inférieure, pouvaient-ils, en droit, obtenir cette contrainte par corps, après avoir librement formulé et produit leur réclamation devant le Syndic, en un mot, le fait d'avoir formulé cette réclamation les prive-t-il: 1° du droit d'action pur et simple; 2° du droit de la contrainte par corps? 2° Les demandeurs, en supposant qu'ils eussent droit d'action, et de contrainte par corps, ont ils prouvé les faits de fraude pourvus par la section 92 de l'acte de faillite de 1869? 3° En supposant que les faits de fraude ne fussent pas prouvés, de sorte que la contrainte ne pût pas être accordée, le droit d'action à l'effet d'obtenir une simple condamnation existe-til, ou n'était-il pas enlevé ou suspendu par suite de ce que la

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réclamation des appelants avait été produite devant le Syndic? La réponse à la 1ère question se trouve en toute lettre à la fin de la 92e section de l'acte de faillite de 1869, où il est dit que, pour réussir dans son action, pour recouvrer une dette contractée sous les circonstances ci-dessus, le demandeur devra alléguer fraude contre le défendeur, et l'en convaincre. Ceci établit évidemment le droit d'action exceptionnelle. Mais les défendeurs prétendent que la section 100 du même acte, prévoyant le cas où le créancier aurait déjà formulé et produit sa réclamation pour cette même dette, devant le Syndic, déclare que, dans ce cas, la décharge que le failli pourra obtenir aurait pour effet de le débarrasser du danger d'une contrainte par corps, et, par un raisonnement très plausible, ils en argumentent que le droit d'action et de contrainte par corps se trouve virtuellement détruit, en un mot, les défendeurs prétendent que les demandeurs, en produisant leur réclamation, ont enlevé à leur dette le privilège qu'elle avait, savoir, de soumettre les défendeurs à la contrainte par corps, et que cette dette n'a plus que le caractère d'une dette ordinaire, et qui ne les expose plus à l'emprisonnement. Quelque plausible que soit ce raisonnement, et malgré l'habileté avec laquelle il est présenté, je crois que les demandeurs n'ont pas perdu leurs droits de contrainte par corps contre les défendeurs, en formulant leur réclimation devant le syndic. En effet, les Demandeurs pourront obtenir leur contrainte par corps contre les Défendeurs, et, si ces derniers sont assez fortunés pour obtenir leur décharge, je considère qu'en vertu de la section 100 de l'acte de faillite, ils auront droit à leur libération du jugement les déclarant contraignables, à compter du prononcé de leur décharge. Je crois que cette interprétation est saine, et concilie ce que l'on pourrait trouver de discordant entre les sections 92 et 100 de l'acte de faillite de 1869. La 2e question relative à la preuve des faits de fraude prévue par la section 92 de l'acte de faillite est assez facile à résoudre. En effet, voici deux défendeurs insolvables, dès le 31 décembre 1869, et qui, malgré ce fait patent, continuent leur commerce, achetant à droite et à gauche, et jusqu'au jour de leur faillite, reçoivent des marchandises, tiennent des livres, mais craignent d'établir leur bilan, obtiennent ainsi des effets et des crédits considérables de gens auxquels ils ne font pas connaître l'état de leurs affaires, sur lequel ils ne jugent pas à propos de s'éclairer euxmêmes, par la bonne raison qu'ils en craignaient le résultat, probablement, et cependant, ils viennent avouer que, dès 1869, ils avaient un déficit de \$1400; que, dès 1870, ils étaient gênés, et qu'à leur cession, en février 1872, ce déficit variait de \$28 à \$38,000, et ils espèrent trouver grâce devant le monde

commercial, sur le principe qu'ils étaient de bonne foi. La fraude n'est pas toujours facile à saisir ni à suivre, mais elle s'infère d'une suite d'actes blâmables et condamnés par les lois. Or, le fait de ne pas tenir leurs livres de manière à présenter un bilan clair et évident pour eux-mêmes, est une preuve de fraude, en ce qu'ils exposaient volontairement à une perte certaine les personnes qui, confiantes en leur honnêteté, et les voyant toujours en bons rapports avec les banques, leur font des avances; on sait que le commerce est basé sur la bonne foi, exige des transactions rapides, et qui ne donnent pas toujours le temps de la réflexion, ni celui de faire des questions chez la personne qui vend ou avance; cette dernière a sous les yeux des chalands dont elle n'a pas de motifs de suspecter la bonne foi ni l'insolvabilité, et qui cependant, par omission constituant une fraude légale, l'induisent à se dessaisir de ses effets, ou de son argent, en ne leur faisant pas connaître son véritable état. Il est inutile pour les défendeurs d'alléguer qu'ils avaient l'epoir de couvrir leur déficit, et de se refaire par une année ou deux de bonnes affaires. Ils n'avaient pas ce droit, et le fait d'avoir caché cette circonstance à leurs créanciers les constitue en mauvaise foi, les convainc de fraude légale, et les rend passibles de l'emprisonnement prévu par la section 92 de l'acte de faillite de 1869. En réponse à la troisième question, je crois que le juge en lère instance, avant nié la fraude reprochée aux défendeurs, devait renvoyer l'action purement et simplement. Le droit d'action, en vertu de la 92e section, ne se tire que du reproche et de l'accusation de fraude, surtout dans un cas comme celui qui nous occupe, où le créancier a formulé et produit sa réclamation devant le syndic; or, si l'élément principal (qui est la fraude) disparaît, la condamnation pure et simple ne peut avoir lieu, parce que le demandeur a déjà fait sa réclamation. Elle est sub judice, et tout autre recours contre le défendeur est suspendu pour le moment, car, ne perdons pas de vue que le syndic est un tribunal qui adjuge sur l'existence de la réclamation, et dont le jugement est susceptible d'appel devant le juge, et devant la cour de revision et la cour du Bane de la Reine. Il y avait donc litispendance de l'action du demandeur, et, si ce n'était du fait de fraude qui tire l'action des demandeurs de l'ordre des choses ordinaires, et qui rend les défendeurs passibles de la contrainte par corps, je serais disposé à dire que les demandeurs ne pouvaient pas obtenir une condamnation pure et simple, et sans contrainte. Tout considéré, je crois que les défendeurs sont passibles, non seulement d'une condamnation pure et simple, au montant de \$2320.35, avec intérêt et dépens, mais encore d'une contrainte par corps, et je les condan plut défe faill D

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damnerais à trois mois de prison, etc., à moins qu'ils ne payent plutôt ladite somme, intérêt et frais, ou à moins que les défendeurs n'obtiennent une décharge suivant l'acte de faillite de 1869.

DUVAL, C. J., said the case, in his opinion, was a very plain The plaintiffs, creditors, complained of their debtors and charged them, in the very words of the statute, with having on such a day, knowing that they were not able to pay, purchased from the plaintiffs certain goods, wares and murchandises. And, in consequence, they brought their action, demanding not merely a condamnation for the amount of the debt due them, but also asking that defendants be imprisoned in the discretion of the Court. In His Honour's opinion, the judge would have had no jurisdiction whatever, if there had not been a charge of fraud, not merely an allegation of fraud in the declaration, but an allegation upon which the judge was called upon to pronounce. If he had found no fraud proved, it would have been his duty to dismiss the action altogether. And there was a very plain reason why it should be so: the case was sub judice, it was before a competent Court, the Insolvent Court. But that Court did not suffice when there was a demand for imprisonment, which the assignee had no power to order. The judge should, therefore, have dismissed the action, if he found no fraud. The question, then, presented itself whether there was fraud in this case. It was said there was no moral fraud. His Honour did not know that it was necessary that moral fraud should be proved. The law said this: if you purchase goods when you have no reason to expect to be able to pay for them, you are guilty of fraud. It was said also that defendants were young gentlemen in whom the organ of hope was largely developed. This was rather an argument against They said their insolvency was owing to the unexpected withdrawal of confidence by one of the banks, and their paper not being discounted any longer. This proved that they had not money to carry on their business, and that they were trusting to the aid of the banks. On their own showing, therefore, they were carrying on business without any funds. Then, as to their books, they were not accurately kept; but, loosely kept as they were, the inability of defendants to pay their debts was established on the face of their books. When one of the creditors said to the debtor, "You knew, a year ago, that you could not pay your debts," he did not deny it, but said he had hope to have been able to pay. Credit at the Bank being suddenly stopped, defendants' insolvency at once became manifest. His Honour referred to a supposed clerical error in the 92nd section of

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the Insolvent Act, which said that the party should be imprisoned, until payment of the debt or costs. This, he thought, not an error, but succeptible of reasonable explanation. Under all the circumstances, the Court foun I the case proved against the defendants, and there would be a judgment drawn in accordance with the Statute; the term of imprisonment to be three months in each case.

In the judgment the order for imprisonment was as follows: "Doth order, that Edmond Sancer and Guillaume Sancer be immediately taken into custody, and imprisoned, for three calendar months, unless the debt, interest and costs hereinafter mentioned be sooner paid. Judgment of Court below reversed." (18 J., p. 57)

F. E. GILMAN, for appellants. STRACHAN BETHUNE, Q. C., counsel. ROBIDOUX & BÉIQUE, for respondents.

VENTE DE CREANCES.-GARANTIE.

COURT OF QUEEN'S BENCH, Montreal, 24th June, 1873.

Coram Duval, Ch. J., Drummond, J., Badgley, J., Monk, J., Taschereau, J.

LAFOND et al., Appellants, and RANKIN, Respondent.

Held:—That an assignee who sold outstanding debts due to the insolvent, under the 44th section of the Ins. Act of 1869, according to a schedule exhibiting the original amounts of such debts, without deduction of payments received by the assignee on account, was bound to account for and pay over to the purchaser of such debts the full amount of such payments, so made to the assignee, notwithstanding that the conditions of sale declared:—"that the sale is made without any guarantee whatever, or any warranty of any kind or description whatever, so much so that no warranty is given that live debts have even existence,"—and notwithstanding, also, that the audience were informed by the auctioneer, that dividends had been paid, and that the amounts in the schedule were the original amounts, without deduction of such dividends,—and notwithstanding, further, that the total amount paid for such debts was only a few dollars and the payments in question amounting to more than \$600.

This was an appeal from a judgment rendered by the Superior Court, at Montreal (JUSTICES BERTHELOT, MACKAY and TORRANCE), sitting as a Court of Review, on the 31st October, 1871, confirming a judgment rendered by Mr JUSTICE MONDELET, on the 29th April, 1871, whereby the appellants' action was dismissed, with costs.

BADGLEY, J. (dissentiens): The action was brought against Rankin individually, and as assignee, for \$637.66, which

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plaintiffs alleged to be the aggregate of several debts which defendant had caused to be sold at a sale of book debts of Hingston & Co., but which he had, previous to the sale, collected and received. This is not a personal contract by Rankin; he was acting under the Insolvent Law, as assignee for the mass of the creditors, and sold the debts, as detailed on the schedules, with the understanding that the figures shewed the original debts, but, at the same time, notified the purchasers that dividends had been paid on account. The purchaser, Lafond, knew all this, of which there can be no doubt, and the Insolvent Law has provided, in the public interest, that assignees shall not be made personally liable for their acts, where there is no fraud proved. Assignees are acting in a quasi public capacity, and are protected by the claus of Insolvent Law. See 14 sect., for sale of debts, in which the assignee is required to keep a list of the debts to be sold for public inspection, the debts due to the bankrupt, then sec. 46, and no warranty, except as to the good faith of the assignee, shall be created by the assignee's sale of the bankrupt's debts, not even that the debt is due, see form K. Moreover, the condition of the sale was not only without warranty, even of the existence of the debts as sold, but Barsalou, the auctioneer, swears that he notified purchasers that the amounts stated to be due were the original debts without deduction of dividends. I am not disposed to disturb the original judgment confirmed by the Court of Review.

DUVAL, C. J. (also dissentiens), wished to say, however, that he did not sanction the proceeding of the assignee in selling debts which he had already himself received. The buyer, however, did not take the proper course: he might have repudiated the contract, or claimed a deduction from

what he had to pay.

Monk, J., said that the case presented itself in this form. Here was a man who sold a debt, with a number of others, without any guarantee, except of his own acts. He also abstained from any guarantee that the debt was due. These were perfectly intelligible propositions, but the Court came to a debt which was not only not due at the time, but which the assignee had received himself. His Honour thought that, under these circumstances, the plaintiff was entitled to succeed.

DRUMMOND, J., had a very strong suspicion that the notice, as to there being no warranty, &c., was given in the most artful manner, so as to keep within the letter of the law, but perhaps in a way not strictly honest. The assignee was not answerable for the debts that were paid before he got into office, but he was bound for the debts that he received himself.

TASCHEREAU, J.: Les faits qui ont donné lieu au présent litige sont à peu de choses près les suivants: Les appelants achetèrent le 18 octobre 1870, à une vente publique, en vertu de l'acte de faillite de 1869, plusieurs milliers de piastres de dettes actives de la faillite des nommés Hingston, Telfer et Cie, lequel achat ils payèrent \$308.90, savoir: \$68.96, pour les créances au-dessus de \$100, lesquelles furent vendues séparément, et \$140 pour dettes au-dessous de \$100, et qui leur furent aljugées en bloc. Cette vente se fit à l'instance du défendeur, comme syndic à la faillite susdite, et conformément aux sections 44 et 46 de l'acte de faillite de 1869. les appelants s'étant mis en frais de collecter ces diverses sommes qui leur ont été vendues, il y en a dont les montants réunis, formant up total de \$637.66, avaient été reçus par le défendeur lui-même, comme syndic. Les appelants ont intenté contre le défendeur, tant en son nom et qualité individuelle, qu'en sa qualité de syndic, une action par laquelle ils lui demandent ces diverses sommes qu'il avait retirées et que cependant il leur avait vendues. Le défendeur prétend se soustraire à cette obligation, en disant : "que la vente aux " demandeurs, par le défendeur, fut faite sans aucune garantie "quelconque, et même sans aucune garantie de l'existence de " ces dettes, et que ces conditions furent lues à l'assemblée à " laquelle eut lieu la vente en question, que l'un des deman-" deurs était présents, et a dû entendre ces conditions, que " Barsalou, encanteur en cette occasion, avait expliqué que, " dans les cas dans lesque!s les dividendes avaient été payés au " défendeur Rankin, ou aux faillis, les montants portés comme " dus étaient ceux originairement dus et sans déduction des " dividendes, et que M. Lafond a dû entendre ces explications." En effet l'intimé, à son enquête, a produit le texte de l'annonce lue par l'encanteur, et qui est en ces mots en langue anglaise: "The sale is made without any guarantee whatever " or any warranty of any kind or description whatever, " so much so that no warranty is given that the debts have " even existence." L'enquête établit que les demandeurs ont prouvé sept des huit items qu'ils reprochent au défendeur de leur avoir vendus, sachant qu'ils n'étaient pas dus, pour la bonne raison qu'ils les avait collectés lui-même comme syndic, ce qui laisse une balance de \$633.31. Maintenant s'élève la question de savoir si une telle vente, avec de si extraordinaires conditions, est valable ou non, et, si elle n'est pas valable, quel recours ont les demandeurs contre le défendeur, pour leur indemnité. Prenant d'abord les deux clauses 44 et 46 de l'acte de faillite de 1869, on y voit en toutes lettres que le syndic, après avoir opéré avec diligence la perception des créances du failli, s'il trouve qu'il en reste encore dont la per-

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ception serait plus onéreuse que profitable à la masse, pourra, sur ordre du juge, les vendre, après avoir dressé une liste des créances à vendre, celles excédant \$100 devant être vendues séparément, et nulle garantie, excepté quant à la bonne foi du syndic, ne sera créée par la vente, pas même la garantie que la créance est due. Ces pouvoirs, avec de telles conditions, sont exorbitants, sans aucun doute, et pour nous les faire respecter, il faut bien toute l'omnipotence d'une législation. Mais, enfin, telle est la loi; et il nous la faut interpréter, pour lui donner effet, sans blesser la justice, l'équité, et peut-être quelqu'autre texte de notre droit canadien. Si le défendeur a fait son devoir comme syndic, il a dû s'occuper avec diligence (ce sont les mots du texte) de la perception de lactif de la faillite, et se mettre au fait du montant restant dû. Il n'a pas dû agir en aveugle, ni avec une précipitation fiévreuse, ni encore moins oublier ou perdre de vue les montants perçus par lui-même. S'il a fait tout cela, et que cependant il ait annoncé en vente des créances dont il avait reçu le montant entier, ou pour une grande partie, peut-il prétendre que sa bonne foi le protégera contre tout recours comme celui qu'exercent les demandeurs? J'en doute fort; ou, plutôt, je n'ai aucun doute qu'il ne peut se retrancher derrière cette bonne foi, car, ou il a tenu des comptes, ou il n'en a pas tenu: s'il en a tenu, il ne pouvait de bonne foi ignorer avoir déjà reçu ce qu'il offrit en vente : s'il n'en a pas tenu, il est coupable d'une négligence que je ne puis qualifier, et qui le rend responsable de ses actes. Il y a dans cette section 46 l'exception à la non-garantie, c'est celle de la bonne foi du syndic, qui, pour une raison ou pour une autre, ne peut constater l'existence de la créance, soit qu'elle ait été payée au failli qui aurait omis d'en faire l'entrée en ses livres, soit qu'elle n'existe pas, par suite de quelque erreur ou prétention mal fondée du failli; or, dans ces cas, je comprends que la législature, dans le but d'arriver à un prompt règlement d'une faillite, et de permettre à un failli de reprendre sa place dans le monde commercial, sanctionne ce mode de vente de telles créances, mais l'idee qu'un syndic puisse, avec les yeux ouverts, et en connaissance de cause, vendre ce qu'il a déjà reçu, ce serait, à mon sens, une monstruosité que de prêter à la législature une telle intention et une telle législation; ce ne serait ni plus ni moins que de permettre au syndic de tirer double mouture du même sac; ce serait lui dire, collectez tout, et vendez tout ce que vous aurez collecté. En effet, si c'est légal pour un item, je ne vois pas pourquoi le syndic ne pourrait pas logiquement réclamer tous les autres items. Ainsi donc, l'acte de faillite de 1869, invoqué par le défendeur lui nême, milite contre lui, en soumettant à

la garantie les actes du syndic dans lesquels sa bonne foi serait compromise. Notre code canadien, en son article 1509, répulie toute convention par laquelle le vendeur voudrait se soustraire à la garantie de ses faits personnels, et toute convention dans ce sens y est déclarée nulle, comme contraire, l'imagine, à la morale, ou à l'ordre public. La section 46 de l'acte de fa.llite de 1869 n'est donc pas incompatible avec l'art. 1509 du code, avec au moins la distinction que j'ai indiquée, savoir, lorsque la garantie est alléguée contre le syndic lui-même, pour cause de fraude légale, ou de négligence approchant la fraude. Si une telle conduite, de la part d'un syndic, était tolérée comme légale, les intérêts des malheureux faillis, ou plutôt de leurs créanciers, seraient bien compromis: en effet, si on permet de vendre \$633.31, qui ont été collectés sur \$2390 de créances actives, je ne vois pas pourquoi un syndic, dans le prétendu intérêt de ses commettants, ne vendrait pas toutes les créances par lui perçues, sans craindre d'être inquiété, car une fois parti dans cette voie. il n'y a pas de raison de dire qu'il y a une limite. Et ces pouvoirs une fois connus comme sanctionnés par les tribunaux, auront pour effet de déprécier toutes telles ventes de créances de syndics, d'abord, par la crainte de l'insolvabilité des débiteurs, et ensuite, par celle que toutes ces créances n'aient déjà toutes été perçues par un syndic, qui interprétera à sa guise, le code civil et la clause 46 de l'acte de faillite de 1869, et on verra ces ventes avec une telle défiance que personne bien placée ne voudrait s'y montrer, ni comme simple spectateur ni comme enchérisseur. Et qui souffrirait en fin de compte de cet état de choses? Les créanciers, sans aucun doute; et qui en profiterait? Les spéculateurs de mauvaise foi qui, au moyen de ce que nos voisins, d'au delà de la ligne 45 appellent un ring, réussiront à accaparer, pour des prix fabuleusement bas, des créances que personne non initié ne se risquerait à acquérir. Je suis donc contre les prétentions du détendeur, que je trouve exorbitantes, et contraires à tout principe de notre droit, et à la morale même. Voyons maintenant quel recours les demandeurs ont contre le défendeur. Ont-ils un recours personnel contre le défendeur, simultanément avec celui qu'ils ont contre lui en qualité de syndic? Ont-ils ce recours pour toute la somme, ou seulement pour une proportion et quelle proportion? Je crois que les demandeurs ont un recours contre le défendeur personnellement, et en sa qualité de syndic. Ce que les demandeurs reprochent au défendeur est la fraude dont il s'est rendu coupable à leur égard, en bar vendant une créance qui n'existait plus, parce qu'il l'avait retirée lui-même. Or, on sait que, comme tel, le défendeur est obligé de réparer le dommage qu'il leur cause,

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ce dommage est la privation du montant des créances en question qu'ils ne peuvent retirer des débiteurs, mais que le défendeur a lui-même retirées. Le défendeur ayant reçu ces sommes, après les avoir vendues aux demandeurs, est tenu de les remettre aux demandeurs qui ne lui demandent pas autre chose; mais comme il a pu en sa qualité de syndic se dessaisir de ces sommes, il ne peut être tenu personnellement. Mais les demandeurs n'ayant payé que \$140, pour les dettes au dessous de \$100, et \$168.90, pour les dettes au dessus de \$100, ne serait-il pas légal de ne lui accorder le remboursement de ses acquisitions, ou d'une proportion quelconque des \$633, prenant en considération son prix d'achat, et le montant total de ce qui lui a été vendu? Je crois que la vente ayant été parfaite par le consentement des parties contractantes, au moyen de l'adjudication et du contrat écrit qui l'a suivie, les demandeurs ont droit à la chose entière, et qu'on ne peut ici appliquer l'article 1487 du code civil, qui énonce que la vente de la chose qui n'appartient pas au vendeur est nulle, parce que, dans le cas actuel, le vendeur n'a jamais cessé d'être propriétaire de la chose vendue, qu'il l'a encore en sa possession, et qu'il est conséquemment tenu de la délivrer à celui à qui il l'a vendue. C'est en vain que le défendeur prétend se soustraire à la responsabilité légale qu'il a contractée envers les demandeurs, de les indemniser, en disant qu'il n'a payé qu'un faible montant pour les quelques milliers de piastres qu'on lui a vendues, et dont il pourra peut-être recevoir une assez forte proportion. Cette défense ne vaut rien, à mon point de vue, car, si le syndic a fait son devoir, et suivi ce que lui enjoint la section 44 de l'acte de faillite de 1869, il a dû percevoir tout ce qu'il y avait de bon dans cet actif, et ne laisser que les mauvaises dettes, dont le recouvrement serait plus onéreux que profitable: et peut-il prétendre qu'il reste encore des montants dont la collection soit profitable, à moins de plaider dans ce sens, et de supporter son plaidoyer par la preuve? Il n'a rien fait de tout cela. Mais, d'ailleurs, l'eût-il fait, il n'est pas possible au défendeur de se dégager d'une grande responsabilité par des suppositions : où pourrait-on s'arrêter pour dire que l'adjudicataire de telles créances a ou n'a pas de chances de se sauvegarder? ce serait un travail à n'en plus finir, une tâche assez difficile et qui répugne à toutes les règles du droit. Il eût été beaucoup plus simple et beaucoup plus expéditif, pour le défendeur, de tenir compte des dettes qu'il a vendues, et qu'il avait déjà reçues, ou sur lesquelles il avait déjà reçu de forts acomptes ; de cette monière, tons les intérêts, ceux des créanciers, du failli et ceux du syndic lui-même, eussent été protégés d'une manière effective et ans exposer personne. La prétention du défendeur que TOME XXIII.

les conditions de la vente, savoir, qu'il y ait eu des paiements effectués sur certaines dettes, n'est pas soutenable. D'abord, il n'est pas prouvé que les demandeurs aient eu connaissance de ces conditions qui, suivant la preuve, n'ont été exprimées que verbalement, et, ensuite, les eussent-ils comprises, je considère qu'elles sont illégales, comme contraires à l'article du code qui répudie toute garantie contre les faits personnels, et comme contraire à la bonne foi. Puisque le défendeur a bien voulu prendre le trouble de faire mettre par écrit les conditions de la vente, il aurait dû y inclure celles relatives aux dividendes. Car leur omission était et a sans doute été de nature à tromper les demandeurs. De plus, j'observe que l'acte de vente, par le défendeur aux demandeurs, et qui est leur fait, ne fait aucune mention de cette réserve quant aux dividendes. Tout considéré, je crois, comme l'exprime bien le factum des appelants, que la sympathie n'est pas pour le vendeur syndic, mais bien pour l'acquéreur, et que le jugement, qui a renvoyé l'action des demandeurs devait être infirmé, et le défendeur condamné personnellement, et en sa qualité de syndic, à payer aux demandeurs la somme de \$633.31, avec intérêt du jour de la signification de l'action du défendeur, et les dépens devant toutes les cours. Je suis d'opinion que les demandeurs doivent réussir pour le montant entier de leur réclamation, moins cependant la somme de \$4.35, item relatif à une dame O'Neil, de laquelle somme les demandeurs n'ont pas prouvé le paiement au défendeur.

"La Cour, considérant qu'au nombre des créances des faillis, James Hingston & Co., et Hingston, Telfer & Co., offertes en vente par encan public, par le défendeur intimé, en sa qualité de syndic, le dix-huitième jour d'octobre 1870, dont les demandeurs appelants se sont portés acquéreurs, se trouvaient comprises un certain nombre de dettes qui avaient déjà été perçues en totalité, ou en partie, par le défendeur, sous forme de dividende ou autrement; Considérant qu'il résulte, tant de la preuve que des admissions du défendeur, intimé, que les sommes ainsi perçues par ce dernier, sur les créances par lui offertes en vente, et préalablement au dit encan, forment un total de \$633.31. Vu qu'en vertu de l'article 1509 du Code Civil, le défendeur, quoiqu'il ne fût soumis à aucune autre garantie, était cependant obligé à la garantie de ses faits personnels; Vu la section 46 de l'Acte de Faillite de 1869; considérant que le défendeur était tenu à la garantie de sa bonne foi; Considérant que le défendeur, qui a vendu ces créances, après en avoir retiré les montants, ne pourrait se soustraire à l'obligation d'en payer le prix aux demandeurs, appelants, que dans le cas où il les aurait ainsi vendues par encan, après en avoir déjà rendu compte à la succession des

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réances des lfer & Co., leur intimé, etobre 1870, quéreurs, se qui avaient endeur, sous u'il résulte, eur, intimé, les créances encan, forarticle 1509 is à aucune de ses faits e de 1869; antie de sa vendu ces pourrait se emandeurs, endues par cession des

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dits faillis, moyen qu'il n'a ni plaidé ni prouvé; Considérant que la loi (section 46, Acte de Faillite de 1869), en exemptant le syndic de la garantie que la créance est due, n'entend l'exempter que de la responsabilité d'un fait impersonnel à lui, comme serait celui de l'entrée d'une fausse créance par le failli dans ses livres de compte, et non d'un fait personnel au syndic lui-même, comme celui de la vente d'une créance ayant réellement existé, mais dont il aurait perçu le montant lui-même avant de l'offrir aux enchères; Considérant que l'annonce verbale faite par l'encanteur du défendeur, au moment de la vente, à l'effet de dire que les montants originaires étaient vendus sans déduction des dividendes reçus n'était d'aucune valeur légale, vu qu'elle n'était pas accompagnée d'un état indiquant en détail les sommes reçues et communiqué à tous les enchérisseurs; Considérant que l'annonce lue par l'encanteur, lors de la vente, et produite par le défendeur, sous la rubrique "Conditions of Sale," quoique calquée en grande partie sur le texte même de la section 46 de l'Acte de Faillite de 1869, omet précisément la garantie de la bonne foi que la loi exige formellement du syndic, après l'avoir exempté de toute autre garantie." Judgments below reversed and defendant condemned to pay \$633.31. (18 J., p. 62; 3 R. L., p. 449; 1 R. C., p. 474, et 2 R. C., p. 107.)

LANCTOF & LANCTOT, for appellants.
BETHUNE & BETHUNE, for respondent.

PRESCRIPTION.

Superior Court, Montreal, 30th September, 1873.

Ceram Mackay, J.

HILLSBURGH VS MAYER.

Held:—That the prescription of a promissory note made in a foreign country and payable there, is to be governed by the lex fori, and not by the lex loci contractus. (1)

The plaintiff, residing in the State of New York, one of the United States of America, brought this action, on the 7th

⁽¹⁾ Dans l'affaire de Wilson, appelant, et Demers, intimé, il a été jugé (C. S., Montréal, 9 juillet 1806, Berthelot, J.) que la prescription d'un billet fait et payable dans un pays étranger, doit être réglée d'après la loi du domicile du débiteur, lex fori, et non d'après la loi du lieu où le contrat a été passe, lex loci contractus. Sur renvoi des parties devant la Cour Supérieure par la Cour du Bane de la Reine, pour irrégularite dans la procédure, il a été jugé (28 mars 1868, MONDELET, J.) que la prescription d'un billet fait et payable dans un pays étranger, était réglée d'après la loi du lieu où doit se

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of December, 1872, against defendant, living in the city of Montreal, Canada, upon a promissory note given by defendant to plaintiff, in the city of New York on the 18th of July, 1866, and which became due and payable there, on the 21st January, 1867. At the time the note became due, defendant was a resident of the city of New York, had his domicile there, and continued to have it there, up to the 15th day of March, 1869. From and after this last date, defendant had his domicile in the city of Montreal. The defendant pleaded that the note in question matured, and became due and payable more than five years before the service of the suit, and that plaintiff's action was barred and prescribed. Plaintiff answered that the laws of the state of New York alone were applicable, and that, by them, such a note was only prescribed by the lapse of six years. The following is the judgment of the Court: Considering articles 2260 and 2267 of the Civil Code, and that, by force of them, and the facts of this case, this action cannot be maintained. Considering that no suit or action was brought on the promissory note, basis of plaintiff's action, within five years next after the day on which said note became due and payable, and that, in consequence thereof, and by law, it must be held to have been absolutely paid and discharged, to wit, before the institution of the present action, doth dismiss plaintiff's action with costs." (18 J., p. 69.)

LAFLAMME, HUNTINGTON & LAFLAMME, for plaintiff.

KERR, LAMBE & CARTER, for defendant.

ATTACHMENT BEFORE JUDGMENT.

SUPERIOR COURT, Montreal, 30th September, 1873.

Coram TORRANCE, J.

McNeven vs McAndrew.

H.ld:—That an attachment before judgment will be quashed and set aside upon notion, if the affidavit upon which it issued does not aver that defendant "is secreting or is about to secrete his estate, debts and effects."

In this case, plaintiff, claiming \$3000, commenced proceeding by an attachment before judgment, under which he

aire le paiement, lorsqu'il est fixé, ou d'après la loi du lieu où le contrat a été passé, si le lien du paiement n'est pas fixé. Ce jugement a été infirmé par la Cour de Revision, le 30 novembre 1868, Mondelet, J., dissident, Mackay, J., et Torrance, J. En appel, le juge Bado ley partagea l'opinion de la Cour de Revision, tandis que les juges Caron, Drommond et Monk soutiment l'opinion du juge Mondelet. (10 J., p. 261; 11 J., p. 105; 12 J., p. 222; 13 J., p. 24; 14 J., p. 317; 2 L. C. L. J., p. 251, et 15 R. J. R. Q., p. 15.)

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caused to be seized a raft of logs. The affidavit contained. inter alia, the following averments: "And the deponent saith further that, by writing sous seing privé, made and passed at Sault au Recollet, on the twenty-fifth day of June last past, the defendant sold to the plaintiff, and agreed to deliver to him, in Tailfour's Bay, in Little River, a raft of logs containing many thousand feet of timber, and, upon such delivery, the plaintiff agreed and promised to pay to the defendant the sum of \$1500, and, in ten days after said delivery, the sum of \$1000, and, in forty days from date of delivery, the sum of \$1370, and, in seventy days from said delivery, another sum of \$1370, as the balance of said price of said logs, if the same on measurement should amount to so much, the whole of the last payments to be made by notes at said delays; that, relying on the good faith of defendant, the plaintiff paid and advanced to defendant the said sum of \$2350, on account of the price of the said logs, trusting that defendant would deliver the logs as he had agreed to do, but defendant, having obtained said advance fraudulently refused and refuses to deliver any part thereof or to restore said sum or any part thereof. And deponent saith further that he has done all in his power, and all he was bound to do, to recover delivery of the logs, and hath tendered to defendant the sums he had agreed to pay and the notes for the other different sums, at the stipulated delays, and yet, defendant, as deponent is informed and believes, is now immediately about to remove, sell and make away with the said logs, with intent to defraud the plaintiff and others, his creditors, and the defendant hath himself declared that he would sall and dispose of the logs to other parties, and would not deliver the same or any part thereof to plaintiff and would not refund the money so advanced; that part of the logs have been removed, and the remainder is being removed by the defendant, from the place where they now are, at St. Laurent out of the jurisdiction of the Court, with intent to defraud plaintiff; and he saith that, without the benefit of a writ of seizure, saisie-arrêt, before judgment, to seize and attach the same, the plaintiff will be deprived of his remedy, will lose his debt and sustain damage, and he hath signed." The defendant moved the Court, on the 17th of September, 1873: that the writ of attachment and all proceedings had thereunder be set aside, because plaintiff did not, in his affidavit, "aver secretion by defendant, or intention to secrete." The parties having been heard upon the motion, the following judgment was rendered.

TORRANCE, J.: Defendant makes a motion that the writ of attachment, saisie-arrêt before judgment, be set aside, because

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the affidavit does not comply with the words of the Code. The charge against defendant is that he was "making away" with his property. The words of the Code are that you must charge the defendant with "secreting" his property. The plaintiff contends that the words "making away with" and "secreting" are synonymous, but that, through some scruple, he would not use the word "secreting," but "making away with." Now, it is doubtful if there are any two words precisely synonymous. The attachment is not in the words of the Statute, and it must be set aside.

"The Court, considering that the affidavit upon which said saisie-arrêt is founded, doth not establish that defendant is secreting, or is about to secrete his estate, debts and effects, doth grant the motion, and doth, in consequence, quash and set aside the writ of attachment and all the proceedings had thereunder, with costs." (18 J., p. 70.)

A. & W. ROBERTSON, for plaintiff.

PERKINS, MACMASTER & PRÉFONTAINE, for defendant.

ARBITRATORS.-COSTS.

SUPERIOR COURT, Montreal, 31st March, 1873.

Coram MACKAY, J.

URQUHART vs MOORE.

Plaintiff claimed \$334.00 for goods sold, which defendant refused, upon the ground that they were not as represented. Upon a reference to arbitrators they found for the plaintiff, less \$20 for broken packages and ordered each party to pay his own costs.

Held:—1st itrators have no right to pass upon costs.

2nd. As the adant had no right to refuse the goods, but should have simply clau and a reduction, the award will be homologated, except as to costs, and defendant condemned to pay all costs.

PER CURIAM At a trade sale of groceries, here, in October, 1870, defendant, a Toronto merchant, bought a lot of groceries. Among the articles purchased, were a lot of mixed pickles, sold for \$333.06. Moore paid for the rest of the goods, but claimed that the pickles were not mixed at all, being nothing but red cabbage. On their arriving at Toronto, Moore held an ex parte survey, and gave notice to plaintiff that they were at his risk. The matter was referred to arbitration, and the arbitrators found in favor of plaintiff, only deducting some \$20 for broken bottles. They, however, ordered that each party should pay his own costs. This was

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altogether beyond their province; they had no power to pass upon the costs. All the equities of the case are with plaintiff, as defendant had no right to refuse so large a quantity, for so small a deficiency, but should simply have asked for a reduction. The award is homologated, except as to costs, and defendant condemned to pay \$313.06 and all costs.

"The Court, having heard the parties, as well upon the motion of plaintiff, that the award of arbitrators, in so far as the arbitrators thereby find and award that plaintiff is entitled to recover from defendant the sum of \$313.06, and interest, be homologated, with costs; and that that portion of said award, whereby the arbitrators assume to adjudicate as to costs, and award "that each party do pay their own costs," be declared to be inadmissible, and void, and be disregarded and set aside with costs, as on the motion of defendants, that said award be homologated, and that judgment be entered up accordingly; and, on the merits; having examined the proceedings, and seen and examined the award of the arbitrators and, on the whole, duly deliberated, doth reject defendants' motion, with costs; and doth grant plaintiff's motion that that portion of said award that adjudicated upon costs be held null, and be rejected, and that the rest of it be homologated, with costs; doth homologate and confirm the report or award of arbitration, save and except that part which adjudges as to costs; and, in consequence, doth condemn defendants, jointly and severally, to pay and satisfy to plaintiff the sum \$31306, being the balance of the price of the goods bought by defendants from plaintiff, with interest thereon from the 17.1 of July, 1872, until paid, and costs of suit." (18 J., p. 71.)

S. W. DORMAN, for plaintiff.

J. J. C. ABBOTT, Q. C., for defendant.

JURISDICTION.—CAPIAS.

SUPERIOR COURT, Montreal, 18th March, 1874.

Coram TORRANCE, J.

Prévost et al. vs Ritchot.

Held:—That in an action for \$72.65, commenced by capies ad respondendum, the Superior Court has jurisdiction to condemn the defendant to pay the amount, notwithstanding that the writ of capies has been quashed.

CORRANCE, J.: This is an action for \$72.65, an amount below that for which an action can be brought in this Court.

The suit, however, was begun by a capias ad respondendum which has been since quashed by a judgment of this Court The question has been raised by defendant's plea whether under the circumstances, the Court has jurisdiction to condemn defendant to pay the amount demanded. After due consideration, I am of opinion that it has, and I, therefore, give judgment for plaintiff accordingly. (18 J., p. 72.)

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DORION, DORION & GEOFFRION, for plaintiff.

S. PAGNUELO, for defendant.

VENTE PAR LE SHERIF D'UN VAISSEAU ENREGISTRE.

Cour du Banc de la Reine, en Appel, Montréal, 9 mars 1871.

Présents: DUVAL, J. en C., CARON, J., BADGLEY, J., et MONK, J.

James Benning et al., défendeurs en cour inférieure, appelants, et James William Cook, demandeur en cour inférieure, intimé.

Jugé:—Que, par la loi de la province d'Ontario, la vente faite par le shérif, dans ladite province, d'un vaisseau enregistré dans un port de la province de Québec, et son adjudication à un créancier hypothécaire n'ont pas l'effet de purger ce vaisseau des hypothèques qui ont été consenties sur icelui, quoiqu'elles soient postérieures à celle de l'adjudicataire.

Le jugement de la Cour Supérieure à Montréal, TORRANCE, J., a été rendu le 20 octobre 1869, dans les termes suivants: "The Court, considering that defendants, Benning and Barsalou, purchased the barge attached by public sale, at auction, from the sheriff of the United Counties of Stormont, Dundas and Glengarry, to wit, in the province of Ontario, as appears by the deed from the said sheriff, of date the 3rd day of April, 1865, produced by defendants Benning and Barsalou, under a writ of fieri facias de bonis, under a judgment obtained by them against defendant Brouse, and from that time Benning and Barsalou have had possession of the barge, as the proprietors thereof; considering that it is proved that, by the law of the province of Ontario, where said purchase was made, by Benning and Barsalou, the effect of the said purchase by them was to merge the inferior title of mortgages theretofore held by them in said barge under the deed of sale by way of mortgage by defendant Brouse to Augustin Cantin, of date the 14th November, 1861, before Gibb, notary, transferred by

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TORRANCE, s suivants: nning and lic sale, at Stormont. Ontario, as he 3rd day d Barsalou, nt obtained time Benrge, as the that, by the was made, irchase by theretofore by way of n, of date sferred by

Cantin to Benning and Barsalou, by transfer of date the 7th December, 1864, in the superior title of sale made to them, as aforesaid, from said sheriff of said United Counties; considering that, by the law of said province of Ontario, the said purchase by Benning and Barsalou was subject to the mortgages and charges theretofore existing on the said barge, of which they had notice, and especially subject to the claim of plaintiff on the deed of sale by way of mortgage declared upon by him and duly recorded on the 9th July, 1862, in the book of registry at the custom-house, at the port of Montreal, and that said purchase, by Benning and Barsalou, from said sheriff, had not the effect, by the law of said province of Ontario, of purging the said mortgage of the plaintiff, which continued to have full force and effect notwithstanding said purchase; considering that the law of the province of Ontario must govern the parties, as regards the effect of the purchase by Benning and Barsalou from said sheriff of said United Counties, doth overrule the pleas of defendants Benning and Barsalou, and considering that defendants have partly proved their pleas of payment, to wit, save and except the amount of \$592.42, with interest, at the rate of 10 070, as specified in plaintiff's mortgage, from the 6th February, 1868; the court doth declare the saisie revendication made in this cause of barge or vessel "Canada Maid," with all and every her boats, anchors, ropes, tackle, gear and appurtenances, good and valid, and doth adjudge and condemn defendant Brouse to pay and satisfy to plaintiff the sum of \$592.42, with interest thereon from the 6th day of February, 1868, at the rate of 10 % per annum until paid, and costs of suit; and the court doth declare plaintiff to have a special lien and mortgage upon said barge or vessel for the payment of said debt, interest and costs, and said defendants are hereby ordered within fifty days after the service of the present judgment upon them to deliver up possession of said barge or vessel, with her appurtenances, to said plaintiff, in order that the same may be sold in due course of law, and the court doth hereby order the said barge or vessel, with her appurtenances, to be sold in due course of law, and the proceeds thereof applied, by special privilege, to the payment of said debt, interest and costs; and, in default of said defendants to deliver up possession of said barge or vessel and her appurtenances to said plaintiff, said defendants are hereby adjuged and condemned jointly and severally to pay and satisfy to plaintiff the aforesaid sum of \$592.42, with interest thereon as aforesaid, with costs."

Ce jugement a été unanimement confirmé par la Cour

d'Appel. (2 R. L., p. 733, et 1 R. C., p. 241.)

DEPENS .- PRIVILEGE.

COUR SUPÉRIEURE, en revision, Montréal, 30 janvier 1871.

Présents: MONDELET, J., BERTHELOT, J., et MACKAY, J.

CLARK vs BREAN, et CORNEIL et al., opposants.

Jugé:—Que, suivant les arts 2017 C. C. et 734 C. P. C.; les frais en appel encourus sur le recouvrement d'une hypothèque ne sont colloqués que suivant la date de leur enregistrement. (2 R. L., p. 734, et 1 R. C., p. 242.)

LETTRE DE GARANTIE.

COUR SUPÉRIEURE, en revision, Montréal, 30 janvier 1871.

Présents: MONDELET, J., BERTHELOT, J., et MACKAY, J.

Long vs Brooks.

Jugé: Que la garantie suivante adressée au demandeur Long: "Please let M. Holmes have whatever doors, sashes, etc., he may want, and I will settle for the same," ne s'applique qu'aux avances par Long a Holmes, pour le parachèvement de la maison alors en voie d'érection, et non aux constructions commencées subséquemment. (2 R. L., p. 735, et 1 R. C., p. 242.)

ASSURANCE.

Cour Supérieure, en revision, Montréal, 30 janvier 1871.

Présents: MONDELET, J., BERTHELOT, J., et MACKAY, J.

Cross vs The British America Insurance Co.

Jugé:—Qu'une police d'assurance ne peut être transportée que du consentement de l'assureur; un avis de ce transport n'a pas l'effet de lier l'assureur. (2 R. L., p. 735.)

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COMPOSITION .- SOMETE.

COUR SUPÉRIEURE, Montréal, 30 janvier 1871.

Présent: MACKAY, J.

In Re BENJAMIN HUTCHINS et al., requérants pour décharge, et JEFFREY et al., contestants.

Jugé:—Que, dans u.ie composition avec les créanciers d'une société commerciale et les créanciers des associés individuellement, les créanciers des deux catégories doivent être mis sur un pied égal, et recevoir le même taux de composition. (2 R. L., p. 735, et 1 R. C., p. 248.)

VENTE.-CRAINTE DE TROUBLE.

COUR SUPÉRIEURE, Montréal, 18 mars 1871.

Présent: MACKAY, J.

ADAM VS MCCREADY.

Jugé:—Que l'acquéreur d'un immeuble, qui a joui pendant dix ans, à titre de propriétaire, d'un immeuble grevé d'hypothèques par son vendeur, ne peut refuser le paiement d'aucune partie du prix de vente pour cause de crainte de trouble résultant de l'existence de ces hypothèques, la prescription les ayant éteintes quant à lui. (2 R. L., p. 736; 3 R. L., p. 448, et 1 R. C., pp. 243 et 473.)

PERE.-MINEUR.

COUR SUPÉRIEURE, Québec, 21 janvier 1871.

Présent: TASCHEREAU, J.

CARON VS SYLVAIN.

Jugé:—Qu'un père a, comme tel, le droit d'utiliser les services de son enfant mineur, de l'engager, et de poursuivre pour ses gages. (1) (2 R. L., p. 736, et 1 R. C., p. 245.)

(1) Un père, non tuteur à son fils mineur, ne peut poursuivre pour les gages de ce dernier. (Carson vs Bishop, C. S., Montréal, 30 novembre 1870, Mackay, J., 2 R. L., p. 624; 1 R. C., p. 121, et 23 R. J. R. Q., p. 321.)

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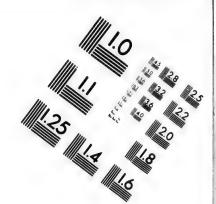
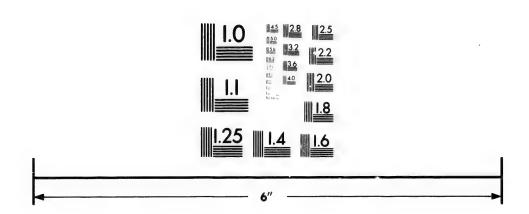
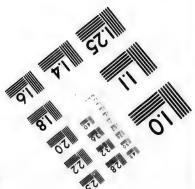


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COUR SUPÉRIEURE, Québec, 21 janvier 1871.

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Présent: TASCHEREAU, J.

POSTON et al. vs WATTERS.

Jugé:—Qu'un associé n'a pas le droit de disposer de la propriété sociale pour son avantage personnel.

PER CURIAM: M., membre de la société commerciale P. et M., demanderesse, étant endetté au défendeur, lui vendit des marchandises qui étaient la propriété de la société, à condition que le prix de ces marchandises serait imputé en paiement partiel du compte du défendeur contre lui. A l'action portée, pour le prix de ces marchandises, le défendeur plaida la convention susdite et compensation. L'associé n'a pas le droit de disposer de la propriété sociale pour son avantage personnel, et la convention alléguée était illégale et nulle. Jugement pour la demanderesse. (2 R. L., p. 736, et 1 R. C., p. 245.)

CONTRAINTE PAR CORPS.

COUR SUPÉRIEURE, Québec, 21 janvier 1871.

Présent: TASCHEREAU, J.

BLAIS VS BARBEAU.

Jugé: Qu'un commandement de payer et avis qu'application pour contrainte par corps sera faite, faute de paiement après le délai fixé par la loi, doivent être donnés avant l'émanation de la contrainte par corps, pour défaut de paiement du montant du jugement. (2 R. L., p. 737, et 1 R. C., p. 246.)

CHEMIN DE PRONT .- RESPONSABILITE.

COUR DE CIRCUIT, District d'Arthabaska, 15 mai 1871.

Coram POLETTE, J.

NAPOLÉON GOUPILLE, Demandeur, vs La Corporation DU TOWNSHIP DE CHESTER EST, et ladite Corporation DU TOWNSHIP DE CHESTER EST, Demanderesse en garantie, vs Basile alias John Ratté, Défendeur en garantie.

Jugé:—Que le propriétaire d'une terre est personnellement tenu des dommages occasionnés par le mauvais état de son chemin de front.

Le demandeur avait poursuivi la corporation du township de Chester, réclamant \$94 de dommages, qu'il avait soufferts, par la perte de son cheval, qui s'était tué dans le chemin de front situé sur la terre de Ratté, vers la fin de janvier dernier, pour avoir brisé sa voiture et son harnais. Il alléguait que cet accident avait eu lieu par le mauvais état dans lequel se trouvait alors la côte, qui fait partie de ce chemin. La corporation du township de Chester Est poursuivit en garantie Ratté, qui, comme son garant, était tenu par la loi, à réparer ce chemin. Ratté résista à cette demande en garantie. disant que, par la loi, il n'était pas le garant de la corporation: qu'il n'était pas obligé, precise ad factum, à l'entretien de son chemin de front; que ce chemin était la propriété de la corporation. "Le terrain occupé par un chemin appartiendra à la municipalité locale." (Acte municipal de 1860, section 40, par. 18); qu'il était bien tenu de travailler à ce chemin, mais que, s'il négligeait de le faire, c'était à la corporation à le faire; qu'il y avait une punition décrétée contre lui, s'il ne faisait pas, ou n'entretenait pas son chemin de front. "Toute personne obligée de faire ou d'entretenir tout chemin de front; qui négligera de le faire ou de l'entretenir.... sera passible d'une amende de douze piastres, qu'elle soit notifiée ou non de faire ou d'entretenir tel chemin; et si elle néglige de faire ou d'entretenir tel chemin après avoir été notifiée de le faire.... elle sera passible d'une pénalité de pas moins d'une piastre, ni plus de quatre piastres par jour, après tel avis." Idem, sect. 62, par. 9. Ces amendes sont la punition de la négligence de ne pas faire et entretenir son chemin de front; mais la satisfaction de ces amendes n'est pas le dernier mot de la peine du négligent. "Chaque fois que des travaux auraient dû être faits, ou que des matériaux qui auraient dû être fournis sur ou pour un CHEMIN DE FRONT, route ou pont.... n'auront pas été faits ou fournis

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.... l'Inspecteur des chemins pourra faire faire ces travaux et pourra recouvrer, devant tout tribunal compétent, du propriétaire.... la valeur de ces travaux, avec vingt par cent en sus de cette valeur".... Idem, sect. 51, par. 5. C'est donc la corporation, par ses inspecteurs, qui est obligée de faire faire ces travaux; si ces travaux ne sont pas faits, qu'il en résulte des dommages, c'est la corporation seule qui en est responsable; "nulle personne tenue de faire ou d'entretenir un chemin de front, n'a été ni ne sera sujette à une poursuite ou action relative à la construction ou à l'entretien de tel chemin de front, excepté pour les pénalités imposées par la 58e section de l'acte des municipalités et des chemins de 1855." Idem, sect. 64, p. 4. Cette disposition de la loi est explicite, formelle et impérative; le défendeur est passible de l'amende, pour négligence; les travaux en outre peuvent être faits à ses dépens, avec vingt par cent en sus; mais c'est tout; elle défend d'outrepasser cette limite: ces dispositions de la loi sont assez rigoureuses, il ne faut pas les dépasser, pour ne pas tomber dans l'arbitraire et la persécution; si la loi autorisait la garantie, le système municipal ne serait qu'une machine pour dépenser: car la partie lésée pourrait de suite s'adresser à l'individu même pour ses dommages, sans s'adresser à la corporation, ni à ses inspecteurs et autres officiers; l'action en garantie doit donc être déboutée. Supposons le propriétaire absent, qu'il serait en Europe; d'après la doctrine qu'on voudrait introduire, il pourrait être personnellement responsable des dommages qui arriveraient dans son chemin de front, qui ne lui appartient pas, mais à la municipalité, qu'il n'a pu surveiller; mais ce serait là une loi qui donnerait des inquiétudes sérieuses aux propriétaires de nos terres des townships et ferait fuir le capitaliste; cette loi serait un danger pour la prospérité publique, et empêcherait le capital de s'introduire ici pour développer nos richesses de mille et une espèces; cette loi de garantie n'existe pas, parce le législateur ne l'a jamais contemplée, encore moins décrétée. La corporation soutenait son droit de garantie, et disait : chaque personne sera responsable des dommages résultant de la non exécution des travaux qu'elle sera tenue de faire: Idem, sect. 51, par. 10. Voilà le principe posé: toute personne tenue à faire des travaux est passible de dommages si elle ne les fait pas; "le chemin de front de chaque lot sera fait et entretenu par le propriétaire ou l'occupant de ce lot." Idem sect. 43, par. 2. Voilà l'obligation de faire cet ouvrage : "Nul avis ne sera nécessaire pour obliger une personne à faire ou entretenir un chemin de front auquel elle sera seule tenue." Idem, sect. 51, p. 4. Cette disposition démontre combien est obligatoire, pour le propriétaire, cette nécessité de faire ou enta ê che ave sec dis sen aut gan saind nat

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entretenir un chemin de front; toute municipalité est sujette à être poursuivie pour tout défaut de faire et entretenir les chemins.... sauf tout recours légal qu'elle peut ou pourra avoir contre ses officiers ou toutes autres personnes. Idem, sect. 64, par. 2. L'action en garantie est appuyée sur cette disposition de la loi, qui est explicite, et ne laisse pas deux sens d'interprétation. La Cour, après avoir commenté les autorités citées par la demande et la défense, admet la garantie, et condamne la corporation à payer au demandeur \$34 de dommage, et les dépens et, faisant droit sur la demande en garantie, condamne le défendeur en garantie à indemniser la demanderesse en garantie de cette condamnation, avec les dépens. (3 R. L., p. 3.)

L. P. E. CRÉPEAU, procureur du demandeur.

WILFRID LAURIER, procureur de la demanderesse en garantie.

E. L. PACAUD, procureur du défendeur en garantie.

BILLET PROMISSOIRE NUL.

COUR DE CIRCUIT, district d'Arthabaska, 16 mai 1871.

Coram POLETTE, J.

Louis Richard, demandeur, vs Onésime Boisvert, défendeur.

Jugé: Qu'un billet promissoire nul, faute des timbres voulus par la loi, n'empêche pas le porteur d'icelui d'en recouvrer le montant, en alléguant la considération donnée pour le billet, quand bien même le billet aurait été mis à néant par un jugement de la cour.

Le défendeur avait, le 7 janvier 1869, présenté un billet promissoire, payable à l'ordre du demandeur, à six mois de sa date; le défendeur fut poursuivi, avec d'autres effets, par le demandeur pour le payement de ce billet, quoiqu'il ne fût pas revêtu des timbres voulus par la loi: le défendeur confessa jugement pour ce billet promissoire, et une partie de la demande réclamée par le demandeur. La confession de jugement ne fut pas acceptée par le demandeur; le défendeur plaida au mérite, et fut condamné à payer une somme plus élevée que celle pour laquelle il avait confessé jugement: ce jugement fut porté en revision devant trois juges, à Québec, et le défendeur fut condamné, non pas suivant la confession de jugement qu'il avait faite, mais la cour retrancha du montant les \$25 pour le billet promissoire, disant que. quand bien même le défendeur aurait confessé jugement pour ce billet, la cour ne pourrait pas le condamner à en payer le montant, parce qu'il n'était pas revêtu des timbres voulus par la loi. Le demandeur le poursuivit en la présente cause, non pas sur le billet, mais sur la considération qui avait été donnée pour ce billet: le défendeur plaida que ce billet promissoire avait fait novation de la dette, et que cette considération était éteinte par le billet que le demandeur avait accepté au lieu et place, en payement de ce billet, et que la novation qui avait été faite de la dette, l'avait éteinte de la même manière que si elle avait été payée; l'article 1138 du Code Civil dit: "l'obligation s'éteint par la novation."

PER CURIAM: Si le billet est nul faute de porter un timbre, (et de fait il l'est), il ne peut pas produire d'effet, ni de novation conséquemment. Mais en le supposant bon, il n'opérerait pas novation de la dette qui n'en serait aucunement changée: ce serait toujours la même dette, et le même débiteur. Le demandeur ayant prouvé sa demande par témoins, la Cour condamne le défendeur à lui payer les \$25 réclamées, intérêts et dépens. (3 R. L., p. 7)

WILFRID LAURIER, pour demandeur.

E. L. PACAUD, pour défendeur.

COUR DE CIRCUIT, district d'Arthabaska, 13 mai 1871.

Coram POLETTE, J.

BENJAMIN MILLET, demandeur, vs MARC GODBOUT, défendeur.

Jugé: Que lorsqu'un billet promissoire n'aura pas été revêtu de timbres, la personne à l'ordre de laquelle il aura été fait, pourra le transporter même après l'échéance, et en y posant des timbres, le porteur pourra en recouvrer le montant du faiseur.

Voici la cause expliquée par la défense même: Que le billet, sur lequel l'action du demandeur est fondée, est nul et de nul effet, dont le paiement ne peut être réclamé devant un tribunal de justice, et aucune cour ne peut condamner le défendeur à payer ledit billet au demandeur, parce que ce billet, lorsqu'il était dans la possession de Guillaume Crépeau, à l'ordre duquel il avait été consenti, n'avait pas été revêtu des timbres ex gés par la loi, et le statut fait et pourvu en pareil cas; que Guillaume Crépeau, là alors le propriétaire du dit billet, a poursuivi le défendeur pour le payement de ce même billet, devant cette cour, dans une cause, sous le n° 16, rapportable et rapportée devant cette cour, le 21 janvier 1871, dans laquelle Guillaume Crépeau était le demandeur, contre Marc Godbout, le défendeur; que le défendeur Marc Godbout

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a plaidé, à l'encontre de l'action du dit Guillaume Crépeau, que l'action devait être déboutée parce qu'elle était basée sur le susdit billet, qui n'était pas revêtu des timbres voulus par la loi et le *tatut fait et pourvu en pareil cas ; que, sur audition au mérite, sur contestation liée contradictoirement entre les dites parties, l'action du dit Guillaume Crépeau a été déboutée par le jugement de cette cour, le 14 février 1871, parce que ledit billet n'était pas revêtu des timbres, ainsi que sus mentionné, d'où il résulte que c'est chose jugée que Guillaume Crépeau n'a jamais pu transporter au demandeur ledit billet, et le demandeur n'a jamais pu l'acquérir du dit Guillaume Crépeau; que le demandeur a depuis revêtu ledit billet de timbres, mais qu'il n'avait pas le droit de le faire, car lorsqu'il avait acquis ledit billet, le terme d'échéance du dit Uilet était depuis longtemps expiré, et Guillaume Crépeau n'avait transporté au demandeur qu'une balance due sur icelui billet qui était la même balance que Guillaume Crépeau avait reclamée par une autre action: article 2287.

Le demandeur disait: qu'on peut toujours apposer des timbres aux billets promissoires, quand une partie l'a acquis de bonne foi, et cela est conforme au statut du Canada 33 Vict., chap. 13, sect. 12, page 55: "S'il appert que le porteur de tel effet, lorsqu'il est devenu porteur, ignorait que le droit exigé n'avait pas été accuitté par la partie ou à l'époque voulue, tel effet sera, néanmons, réputé valide et légal, s'il est constaté que le porteur a acquitté le double droit, tel que mentionné dans la présente section, aussitôt que ce fait est venu à sa connaissance, ou si le porteur, apprenant ce fait lors de l'instruction ou de l'enquète, acquitte immédiatement ce double droit, etc." La Cour adopte la doctrine du demandeur, condamne le défendeur pour le montant réclamé, avec les

dépens. (3 R. L., p. 8)

L. P. E. CRÉPEAU, procureur du demandeur. E. L. PACAUD, procureur du défendeur.

PROCEDURE.

Cour Supérieure, Montmagny, 13 février 1871.

Présent: Bossé, J.

ARSENAULT vs ROUSSEAU et al.

Jugė:—Que plusieurs défendeurs qui ont comparu séparément, mais par le même procureur, peuvent joindre leurs défenses, et n'en produir qu'une. (3 R. L., p. 28, et 1 R. C., p. 247.)

RESPONSABILITE .- PAUX EMPRISONNEMENT.

COUR SUPÉRIEURE, Québec, 2 février 1871.

Présent : STUART, J.

HUARD vs DUNN.

Jugé:—Qu'il n'y a pas d'action pour faux emprisonnement, en vertu d'une conviction valide à sa face, tant que telle conviction est en pleine force et vigueur, et n'a pas été annulée ou cassée. (3 R. L., p. 28, et 1 R. C., p. 247.)

PROCEDURE.

Cour Supérieure, en revision, Québec, 4 février 1871.

Présents: STUART, J., TASCHEREAU, J., et CASAULT, J.

LA BANQUE NATIONALE vs LA BANQUE DE LA CITÉ.

Jugé:—Que le code n'a pas changé la loi antérieure à su passation quant aux détails, dans les causes de la Cour Supérieure, et n'exige pas qu'ils soient annexés ou mentionnés au long dans la déclaration. (3 R. L., p. 28, et 1 R. C., p. 247.)

PROCEDURE .- PROCES PAR JURY.

Cour Supérieure, en revision, Québec, 4 février 1871.

Présents: Meredith, J. en C., Taschereau, J., et Stuart, J., dissident.

PHILIPPSTALL VS DUVAL.

Jugé:—Que, si après la formation d'un tableau de jurés pour servir dans une cause civile et avant la formation du rôle, un nouveau tableau est formé pour une autre cause, cela n'empêchera pas le rôle d'être composé de jurés formant partie du premier tableau. (Arts 437, 438 et 439 C. P. C. de 1897.)

Le 6 mai 1870, sur motion du défendeur, un ordre émana pour le choix des jurés, le 9, et pour le procès le 14. Le 7, le défendeur demande acte de ce qu'il exigeait que le tableau fût composé d'au moins la moitié de jurés parlant l'anglais. Le 8, les jurés ne furent pas choisis, vu que le défendeur n'avait pas fait le dépôt requis, et objectait à la composition de jury; jui jui pr po 30

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rdre émana 14. Le 7, le tableau fût glais. Le 8, leur n'avait ion de jury; plus tard le demandeur fit motion que l'ordre pour le choix des jurés fût annulé; et le défendeur fit motion pour un jury medietatue linguæ; ces deux motions furent rejetées. Le 18 juin, sur motion du demandeur, un ordre émana fixant le 20 juin pour le choix des jurés, et le 7 juillet pour le procès. Le protonotaire avait préparé un tableau de quarante-huit noms, pour le choix qui devait être fait le 2 mai; entre cette date et le 30 de juin, lorsque les jurés furent choisis, un juré avait été choisi dans une autre cause. Le défendeur récusa le rôle entier, alléguart qu'un nouveau tableau aurait dû être fait, commençant par le premier nom suivant le dernier, sur le dernier tableau, savoir : celui du juré qui avait été choisi entre le 9 mai et le 30. Le juge STUART annula le tableau. Le jugement fut renversé en revision. (3 R. L., 291; 1 R. C., 247.)

PROCEDURE.-PROCES PAR JURY.

COUR SUPÉRIEURE, EN REVISION, Québec, 5 octobre 1871.

Présents: Meredith, J. en C., Stuart, J., et Taschereau, J., dissident.

PHILIPPSTALL VS DUVAL.

Jugé:—Que le refus du droit de répliquer à la plaidoirie devant les jurés n'est pas une raison d'obtenir un nouveau procès lorsqu'il n'en résulte aucun préjudice. (Art. 403 C. P. C. de 1867, et art. 471 C. P. C. de 1897.)

Cette cause, une action en dommages pour diffamation, vint devant un jury, et, lors du procès, le défendeur n'ayant examiné aucun témoin, la cour (STUART, J.) jugea que le demandeur n'avait pas le droit d'adresser le jury en réplique. Sur motion pour nouveau procès, basée sur cet allégué et sur d'autres moyens, il fut jugé, par STUART, J., que sous les circonstances, il n'y avait aucun droit de réplique, et par MEREDITH, J. en C., que le refus du droit de réplique n'était pas une raison d'obtenir un nouveau procès, lorsque, comme dans cette cause, il n'en était résulté aucun préjudice. Motion rejetée, TASCHEREAU, J., dissident. (3 R. L., p. 455, et 1 R. C., p. 480.)

RESPONSABILITE. - VOITURIER.

Cour de Circuit, Québec, 21 janvier 1871.

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Présent: TASCHEREAU, J.

TESSIER vs LE GRAND-TRONG.

Jupé:—Que la livraison de barage à un homme de police employé par la compagnie, et à un de ses dépôts, plusieurs heures avant le départ du convoi et en l'absence du gardien du bagage, est suffisante pour obliger la compagnie, lorsqu'il n'est pas prouvé que le demandeur avait connaissance du règlement de la compagnie, qu'elle ne serait responsable du bagage que lorsqu'il serait contremarqué (checked). (3 L. R., p. 1, et 1 R. C., p. 246.)

SEQUESTRE.

COUR SUPÉRIEURE, Québec, 18 février 1871.

Présent: MEREDITH, J. en C.

L'ASILE DE SAINTE-BRIGITE vs FERNAY.

 $Jug\ell$:—Qu'une requête pour séquestre doit contenir les moyens sur lesquels est fondée la demande en séquestre, et qu'il n'est pas suffisant d'alléguer que le requérant a intérêt à ce que les propriétés soient séquestrées. (3 R. L., p. 32, et 1 R. C., p. 246.)

CAPIAS.-PROCEDURE.

COUR SUPÉRIEURE, Québec, 18 février 1871.

Présent: MEREDITH, J. en C.

LEMAY vs LEMAY.

Jugé:—Qu'une requête pour casser un capias ou saisie-arrêt avant jugement ne peut alléguer des moyens d'exception à la forme, V. G., irrégularité du bref et endossement, défaut de copie, etc., et sera rejetée sur défense en droit. (3 R. L., p. 32, et 1 R. C., p. 246.)

VENTE .- CRAINTE DE TROUBLE.

COUR SUPÉRIEURE, Québec, 18 février 1871

Présent: MEREDITH, J. en C.

FARRELL VS CASSIN.

 $Jug\ell$:—Qu'un défendeur ne peut, sous l'article 1535 C. C., exiger une garantie égale à la valeur de la propriété, mais que, lorsqu'il a payé partie du principal du prix de vente, il peut retenir la balance et les intérêts sur icelle pouvant égaler ce qu'il a en partie payé, à moins que le demandeur ne donne caution pour le prix entier de la vente, mais sans intérêt sur icelui. (3 $R.\ L$, p. 32, et 1 $R.\ C.$, p. 246.)

RESPONSABILITE .-- VOITURIER.

COUR SUPÉRIEURE, Québec, 18 février 1871.

Présent: MEREDITH, J. en C.

WINN vs PÉLISSIER.

 $Jug\ell:$ — Qu'un patron de navire n'est tenu, quant à l'emmagasinage, qu'à suivre les règlements et la coutume du port où il prend sa cargaison, à moins de convention contraire. (3 R. L., p. 32, et 1 R. C., p. 246.)

PROCEDURE.

COUR DE CIRCUIT, District de Terrebonne, Sainte-Scholastique, 14 février 1871.

Coram J. A. BERTHELOT, J.

DE BELLEFEUILLE et al., Demandeurs, vs Mackay, Défendeur.

.lugé:—1° Qu'une action pour arrérages de cens et rentes et rente constituée, doit être considérée comme une action purement personnelle, quant à la procédure et aux frais.

2º Que les demandeurs, réclamant \$9.33 pour arrérages de cens et rentes et rente constituée, n'avaient pas le droit d'intenter, ni de traiter leur action comme cause appelable.

leur action comme cause appelable.

3º Que la motion du défendeur, pour la faire traiter comme cause non-appelable, sera accordée avec frais. (3 R. L., p. 33; 7 R. L., p. 428.)

CHS L. CHAMPAGNE, pour demandeurs. J. H. FILION, pour défendeur.

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COUR DE CIRCUIT, pour le comté d'Argenteuil, Lachute, 30 mai 1871.

Coram A. LAFONTAINE, J.

LAROSE vs LAROSE.

Jugé:—Qu'en l'absence du juge, du ches-lieu du comté durant la vacance, le greffier de la Cour de Circuit du comté ne peut en remplir les fonctions, dans les cas de nécessité évidente, et, lorsqu'à raison du délai, l'une des parties peut en souffrir du dommage.

2º Que le greffier a excédé sa juridiction, en accordant les conclusions de la requête du demandeur demandant la possession provisoire d'un cheval par lui saisi-revendiqué, en fournissant cautions.

3° Que sur inscription, pour revision devant le juge en terme, tel jugement sera annulé. (3 R. L., p. 33)

J. H. FILION, pour le demandeur. J. A. N. MACKAY, pour le défendeur.

VENTE .- MANDAT.

COUR DE CIRCUIT, district de Richelieu, Sorel, 9 mai 1871.

Coram L. V. SICOTTE, J. C. S.

L. A. BOYER et al., Demandeurs, vs MAXIME BEAUPRÉ, Défendeur.

Jugé:—Que vu l'aveu du mandant, qu'il a chargé le mandataire d'acheter pour lui de tel marchand, telle espèce de marchandises, et la preuve du chargement des marchandises, par connaissement pris de la compagnie de transport, au moyen duquel le mandant a reçu la plus grande partie de ces marchandises, il sera permis au vendeur de prouver, par le serment du mandataire, la quantité vendue et expédiée.

Les demandeurs poursuivirent le défendeur pour la somme de \$28.31, pour balance du prix de seize caisses de brandy. Le défendeur plaida qu'il avait acheté des demandeurs douze caisses de brandy, pour la somme de soixante et dix-huit piastres, qu'il leur a payée, qu'il n'a jamais donné ordre à qui que ce soit d'acheter les boîtes de brandy dont le prix est réclamé par cette action, et que la seule quantité qu'il ait achetée, et qu'il ait donné ordre à tel mandataire d'acheter pour lui sont les douzaines qu'il a payées, qu'il ne lui a jamais été livré plus que les douzaines de boîtes ci haut men-

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nandataire d'ahandises, et la nent pris de la a reçu la plus u vendeur de vendue et ex-

our la somme de brandy. ndeurs douze et dix-huit é ordre à qui t le prix est tité qu'il ait ire d'acheter u'il ne lui a ci haut mentionnées. Joseph Cartier, entendu comme témoin, déposa que le défendeur l'avait chargé d'acheter des demandeurs douze caisses de brandy, et qu'alors il lui àvait dit qu'il en prendrait quatre autres, au compte du défendeur, mais pour son propre usage à lui (le témoin), et que, pour ces quatre boîtes, il règlerait ensuite avec le défendeur, et que le défendeur lui avait vendu ces quatre caisses après le déchargement du tout à Sorel. (3 R. L., p. 34.)

MARIAGE.-DEPENSES DU MENAGE.

Cour de Circuit, district de Richelieu, Sorel, 8 mai 1871.

Coram L. V. SICOTTE, J. C. S.

AUGUSTIN BONNIER dit PLANTE, Demandeur, vs Ed. BONNIER dit PLANTE, Défendeur.

Jugé:—Qu'un mari qui a fait défenses à un marchand de faire aucuno avance à son épouse, ou à sa famille, sous peine de perdre le montant de ces avances, doit expendant être condamné à payer le prix d'effets et marchandises vendus et livrés à sa famille, lorsque lui ou ga famille ont retiré quelque avantage de ces effets et marchandises par l'usage et la consommation, et qu'il a connu le fait des avances.

Qu'un marchand qui prouve qu'une personne achetait régulièrement chez lui, et le fait de la fourniture d'un grand nombre des articles portés dans un compte, et que le principal commis du temps a laissé pour les Etats-Unis, et que certains effets mentionnés au compte par lui produit avec le bref de sommation ont servi à cette personne ou à sa famille, était une présomption en sa faveur suffisante pour l'admettre au serment supplétoire, lorsque le défendeur base principalement ses défenses sur l'injonction qu'il a faite au demandeur de ne pas rendre ce service à aucun membre de sa famille.

Le demandeur réclamait du défendeur la somme de \$39.88, pour marchandises et effets de commerce, vendus et livrés par le demandeur au défendeur, à Saint-Ours, dans ledit district, aux dates et pour les prix portés au compte produit. Le défendeur plaida qu'il n'avait pas fait de compte avec le demandeur depuis plus de deux ans et demi, et qu'alors il est intervenu un règlement de compte entre eux, par lequel le demandeur a reconnu que le défendeur ne lui devait plus que \$5.33\frac{1}{3}, somme que le défendeur a payée depuis, comme il appert au compte du demandeur lui-même produit en cette cause; que le défendeur n'a pas fait de compte avec le demandeur, depuis au delà de deux ans et demi, et qu'il a alors défendu au demandeur de vendre à crédit à sa femme ou à ses enfants ou domestiques, lui disant qu'il ne serait pas

responsable des dettes ainsi créées. Le défendeur prouva qu'il y avait eu règlement de compte dans l'automne de l'année 1869, et qu'alors il ne devait plus au demandeur que \$5.33\frac{1}{3}; il prouva aussi qu'il avait alors défendu au demandeur d'avancer à crédit, à l'avenir, à sa femme ou à ses enfants. De son côté, le demandeur prouva que, depuis cette date, la femme et les enfants du défendeur ont continué à acheter chez lui des effets et marchandises qui leur ont été utiles et avantageuses, et que les marchandises mentionnées au compte ont servi à l'usaga de la famille du demandeur. (3 R. L., p. 35.)

PREUVE TESTIMONIALE.

COUR DE CIRCUIT, district de Richelieu, Sorel, 9 mai 1871.

Coram L. V. SICOTTE, J. C. S.

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J.-B. GUÉVREMONT, Demandeur, vs CALIXTE GIROUARD, Défendeur, et PIERRE LANGEVIN, Tiers-saisi.

Jugé:—Qu'un défendeur contre lequel un jugement a été rendu, pour une somme de \$22, en 1859, pour délit d'élection, qui établit par témoirs qu'un écrit fut donné par je demandeur au défendeur concernant le jugement, et que note fut enregistrée par un des témoins dans ses livres de compte d'un prêt d'une somme au défendeur pour s'acquitter, sera admis à jurer qu'il a perdu cet écrit, et les circonstances de cette perte; et qu'en ce cas la preuve testimoniale peut être admise.

En février 1859, le demandeur obtint jugement contre le défendeur pour \$40, avec intérêts du 18 février 1858, et les dépens taxés à \$8.90. Le 11 mars 1871, il fit émaner contre le défendeur un bref de saisie, pour saisir et arrêter entre les mains du tiers-saisi Langevin, ce qu'il pouvait lui devoir. Le défendeur contesta la tierce saisie alléguant "que la saisie-arrêt a été émanée mal à propos, attendu que le jugement du demandeur a été, bien avant l'émanation de la saisie-arrêt, payé et acquitté, en capital, intérêts et frais." Le défendeur prouva, par témoins, que le demandeur lui avait donné un reçu, pour le montant du jugement, et admis à son serment, il jura qu'il avait perdu ce reçu, lors de la vente de ses effets et biens-meubles, à son départ du pays, pour les Etats-Unis. (3 R. L., p. 37.)

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ARBITRAGE.-MINEUR.

COUR SUPÉRIEURE, district de Richelieu, Sorel, 4 juillet 1871.

Coram L. V. SICOTTE, J. C. S.

OCTAVE LAPORTE dit SAINT-GEORGE, Demandeur, vs Fran-COIS LAPORTE dit SAINT-GEORGE, Défendeur.

Jugé:—Que le pupille, devenu majeur, peut réferer à la décision d'arbitres, les différends soulevés entre lui et son tuteur, sur le compte que ce dernier !ui rend, et que cette référence n'est pas un traité relatif à la gestion et au compte de tutelle, mais un moyen expéditif et favorable au mineur pour faire décider ses contestations contre le compte que présente le tuteur.

JUGEMENT: "La Cour, attendu, en fait, que le défendeur, après la majorité du demandeur, son pupille, a fait à ce dermier, longtemps avant l'action, reddition de compte à l'amiable, devant le notaire Biron, par recettes et dépenses, avec détail et communication de pièces justificatives; attendu, en fait, que les parties, ne pouvant s'entendre sur certains faits et détails du compte, ont soumis les contestations soulevées entre elles, à propos du compte de tutelle que le défendeur avait fait dresser et préparer par le notaire susdit, à des arbitres, et ont constaté cette référence par un acte authentique, devant le notaire Biron, le 13 mai 1864; attendu, en fait, que les arbitres choisis par les parties ont procédé à l'instruction du différend et contestations en question, en présence des parties, qui ont fait valoir leurs prétentions, durant les différentes vacations nécessitées par l'instruction; attendu, en fait, que ces arbitres ont rendu leur sentence arbitrale, dont signification n'appert pas, quoiqu'il soit prétendu par le défendeur, qu'il y a eu signification; considérant que, si toutefois le demandeur pouvait se plaindre d'irrégularité quant au compte offert et préparé par le défendeur, soit aux procédés des arbitres, il ne peut considérer les faits et actes ci-dessus relatés comme non avenus, et procéder sans les attaquer, pour s'en faire relever et les faire déclarer nuls et non avenus par une action en reddition de compte purement et simplement : considérant que la reddition de compte à l'amiable, par le tuteur, par recette et dépense, avec détail et pièces justificatives, préparée par notaire et communiquée au pupille devenu majeur, laissait à ce dernier à débattre et contester le compte ainsi rendu, en la manière ordinaire en telles circonstances. Considérant que le pupille, devenu majeur, peut référer à la décision d'arbi res les différends soulevés entre lui et son tuteur, sur le compte que ce dernier lui rend, et que cette référence n'est pas un traité relatif à la gestion et au compte de tutelle, mais un moyen expéditif et favorable au mineur pour faire décider ses contestations contre le compte que présente le tuteur. Considérant que le défendeur a justifié ses défenses, déclare le demandeur mal fondé dans sa demande, déboute le demandeur de son action, avec dépens." (3 R. L., p. 37.)

A. A. LAFERRIERE, avocat du demandeur. OLIVIER ET TRANCHEMONTAGNE, avocats du défendeur.

TRANSPORT DE CREANCES.—SIGNIPICATION.

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Cour de Circuit, comté de Rouville, Marieville, 15 mai 1871.

Coram L. V. SICOTTE, J. C. S.

JEAN LAMOUREUX, Demandeur, vs PIERRE RENEAUD, Défendeur.

Jugé:—Que le cessionnaire d'une créance, par transport non signifié au débiteur, peut poursuivre ce dernier, et que la signification de l'action équivant à la signification du transport. (3 R. L., p. 39.)

F. J. CHAGNON, avocat du demandeur. FONTAINE, FONTAINE ET MERCIER, avocats du défendeur.

SUBSTITUTION.—LE MOT ENPANT.—ERREUR DANS LA DESIGNATION D'IMMEUBLES DANS UN JUGEMENT.—APPEL.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 9 septembre 1871.

Présents: Duval, J. en C., Caron, J., Drummond, J., Badgley, J., et Monk, J.

PIERRE PELOQUIN et al., défendeurs en cour inférieure, appelants, et MARCEL BRUNET et al., demandeurs en cour inférieure, intimés.

Jugé:—1° Que le mot enfant, employé en matière de succession testamentaire et de substitution en ligne descendante, comprend par sa propre énergie, non seulement les enfants de l'instituant ou de l'institué, e ce dernier s' relatif à la expéditif et contestations érant que le landeur mal e son action,

fendeur.

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eneaud, Déort non signifié tion de l'action

défendeur.

DESIGNATION L.

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imond, J.,

férieure, apeurs en cour

succession tesnprend par sa ou de l'institué, suivant le cas, mais encore leurs descendants dans tous les degrés, sur la défaillance du degré indiqué dans la disposition, le degré le plus prochain devant néanmoins exclure les autres.

2º Que la représentation en ligne directe a lieu en matière de subs-

titution.

3º Qu'une erreur quant à la contenance de biens immeubles dans un jugement en ordonnant le partage, n'est pas une cause de nullité.

4º Que cette erreur peut être rectifiée en appel par le jugement de la

cour avec dépens contre l'appelant. (1)

Le 26 mars 1870, la Cour Supérieure, à Sorel, LORANGER,

J., a rendu le jugement suivant :

JUGEMENT: "La Cour, considérant que, de l'ensemble des testaments solennels de Pierre Paul Hus, habitant de la paroisse de Sorel, et de Geneviève Badayac dite Laplante, sa femme en secondes noces, reçus devant Henri Crébassa, notaire, et témoins, à Sorel, le premier, le dix-neuf avril mil huit cent neuf, et le second, le seize décembre de la même année, il résulte qu'ils ont légué à Joseph Paul Hus, leur fils, et à Marie Hus dite Cournover, sa femme, et à Catherine, Paul Hus, leur fille, et à Michel Péloquin dit Félix, son mari, la moitié aux dits Joseph Paul Hus et Marie Hus dite Cournoyer, et l'autre moitié à la dite Catherine Paul Hus et Michel Péloquin dit Félix, des immeubles mentionnés aux dits testaments, et qui, d'après la reconnaissance et admission écrite des parties, et produite au dossier, peuvent être désignés comme suit: "B. La moitié indivise d'une terre située en la paroisse de Sorel, contenant deux arpents de front sur quarante arpents de profondeur, bornée en front au fleuve Saint-Laurent, et se terminant en profondeur, partie à Edouard Paul, partie à Olivier Paul, tenant d'un côté à Pierre Latraverse, d'autre côté à la terre ci-après désignée, avec deux maisons, granges et autres bâtisses y érigées; C. Une terre située en la paroisse de Sorel, contenant deux arpents et demi de front, sur quarante arpents de profondeur, bornée en front au fleuve Saint-Laurent, se terminant en profondeur partie au dit Olivier Paul, et partie à Théophile Péloquin, ou ses représentants, tenant d'un côté à la terre ci-dessus en dernier lieu désignée, d'autre côté à l'honorable Jean-Baptiste Guévremont, sans bâtisses y érigées; D. Une terre située en la paroisse de Sorel, de sept perches et deux pieds de front, sur vingt-quatre arpents de profondeur, bornée en front au fleuve Saint-Laurent, en profondeur à la baie de Lavallière, d'un côté par Joseph Paul, et de l'autre côté par Pierre Latraverse; G. La moitié indivise d'un lot de terre situé en la paroisse de Sorel, contenant un arpent et demi de front, sur

⁽¹⁾ Naud et Smith, 22 R. J. R. Q., p. 284; Allen et Corporation du Canton de Onslow, 15 R. J. R. Q., p. 509.

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environ dix arpents de profondeur, borné en front au fleuve Saint-Laurent, en profondeur à la baie Lavallière, d'un côté par Olivier Paul, et de l'autre côté par Pascal Mongeau; H. Une dixième partie de l'île Létourneau et parcille portion dans l'île l'Embarras. "A charge (quels que soient les termes dans lesquels les legs sont couchés et quoique les testaments aient fait usage du mot usufruit pour désigner les droits des légataires) de substitution fidéi-commissaire en faveur des enfants des légataires, la dite substitution devant s'ouvrir à la mort des grevés et devant être attr. buée dans les proportions des legs par moitié à chaque ligne:" considérant que, d'après les principes de notre droit bas-Canadien, qui les a empruntés à l'ancien droit français, qui lui-même les tenait du droit romain, le mot enfant employé en matière de succession testamentaire et de substitution, en ligne descendante, comprend, par sa propre énergie, non seulement les enfants de l'instituant, ou de l'institué, suivant le cas, mais encore leurs descendants dans tous les degrés, sur la défaillance du degré indiqué dans la disposition, le degré le plus prochain devant néanmoins exclure les autres, et qu'ici, par les testaments ci-baut mentionnés, les petits-enfants, et arrière-petitsenfants des grevés ont été directement appelés sur la défaillance des degrés intermédiaires, à recueillir, par souche, avec ou sans le concours des enfants des dits grevés, les dits Joseph Paul Hus et Marie Hus dite Cournoyer, et Catherine Paul Hus et Michel Péloquin dit Félix; qu'indépendamment de cette vocation directe des descendants, pour remplir les degrés laissés vides par les ascendants intermédiaires, d'après les principes du droit commun de la France, que nous suivons et antérieurs à l'Ordonnance des substitutions que nous ne suivons pas comme loi positive, principes consacrés devant nos tribunaux par plusieurs sentences passées en force de chose jugée, la représentation en ligne directe a lieu en matière de substitution, et qu'au secours de cette représentation les petitsenfants des grevés ont été appelés, sur le décès de leurs père et mère, au partage des biens substitués, en concours avec leurs oncles et tantes enfants des dits grevés. Considérant que du mariage du dit Joseph Paul Hus et de la dite Marie Hus dite Cournover, sont nés quatorze enfants, savoir: Edouard Paul Hus, Basile Paul Hus, Marie Anne Paul Hus, femme de Marcel Brunet, un des demandeurs, et Aurélie Paul Hus, femme de Joseph Millet, et que du mariage de la dite Catherine Paul Hus et du dit Michel Péloquin dit Félix sont aussi nés huit enfants, savoir : Pierre Péloquin dit Félix, Théophile Péloquin dit Félix, Paul Péloquin dit Félix, Edwidge Péloquin dite Félix, femme de Joseph Bibeau, Catherine Péloquin dite Félix, femme d'Olivier Paul, Véronique Péloquin dite

nt au fleuve e, d'un côté ongeau; H. ille portion t les termes testaments es droits des faveur des it s'ouvrir à les proporidérant que, n, qui les a e les tenait ière de sucdescendante, les enfants mais encore faillance du us prochain ar les testarrière-petitssur la défailsouche, avec s dits Joseph herine Paul damment de ir les degrés d'après les ous suivons ue nous ne devant nos rce de chose matière de on les petitse leurs père ncours avec sidérant que Marie Hus r: Edouard s, femme de Paul Hus, dite Cathesont aussi k. Théophile widge Pélone Péloquin

loquin dite

Félix, femme de Paul Rajotte, Olivier Péloquin dit Félix et Alexis Péloquin dit Félix, et que, lors de l'ouverture de la substitution, les biens substitués ont dû être attribués par moitié à chaque ligne, c'est-à-dire, que la famille Paul Hus a dû recueillir la moitié de ces biens, et la famille Péloquin dite Félix, l'autre moitié, formant un huitième pour chacun des Paul Hus, et un seizième pour chacun des Péloquin dit Félix, et que ceux d'entre eux qui étaient vivants lors de cette ouverture ont recueilli directement leur part, et que les enfants de ceux qui étaient morts ont recueilli la part respective qui sera ci-après mentionnée, en vertu du double droit créé en leur faveur par la vocation directe et la représentation de leurs père ou mère décédés, sinsi que ci-haut exprimé. Considérant que, d'après les principes ci-haut exposés et les faits de cette cause, tant ceux prouvés que ceux admis par les parties, il appert qu'Edouard Paul Hus, fils de Joseph Paul Hus et Marie Hus dite Cournoyer, a laissé un seul enfant de son mariage avec Marie Désy, savoir : Edouard Paul Hus, qui a recueilli un huitième dans les dits biens, lequel huitième il a cédé au demandeur Marcel Brunet; que Basile Paul Hus a recueilli un autre huitième dont il a fait donation à ses fils, Olivier Paul Hus, Bruneau Paul Hus et Pierre Paul Hus, trois des défendeurs qui sont devenus propriétaires pour chacun un vingt-quatrième dans les dits biens; que les huit enfants issus du mariage de Marie Anne Paul Hus avec Marcel Brunet, savoir: Octave Brunet, Edouard Brunet, Pierre Brunet, Alexis Brunet, Joseph Brunet et Zélie Brunet, demandeurs et défendeurs en cette cause, et Marie Anne Brunet, femme de Joseph Lamère, et Adèle Brunet, femme de François Xavier Balard dit Latour, ces deux dernières cédantes du dit Marcel Brunet, ont recueilli le huitième de leur mère, lequel subdivisé en huit, forme chacun un soixantequatrième attribuable à chacun d'eux; Marcel Brunet étant propriétaire des deux soixante-quatrièmes échus aux dites Marie Anne et Adèle Brunet; que le huitième attribuable à Aurélie Paul Hus, femme de Joseph Millet, est échu aux enfants nés de leur mariage, lesquels l'ont cédé au dit Marcel Brunet, qui est ainsi devenu propriétaire de deux huitièmes, plus deux soixante-quatrièmes, équivalant à un quart, plus un trente-deuxième des dits biens, le reste de ceux échus à la famille Joseph Paul Hus, appartenant, comme il vient d'être dit, aux dits Olivier Paul Hus, Bruneau Paul Hus et Pierre Paul Hus, pour chacun un vingt-quatrième, et aux dits Octave Brunet, Edouard Brunet, Pierre Brunet, Alexis Brunet, Joseph Brunet et Zélie Brunet pour chacun un soixante-quatrième : que la moitié des dits biens échus à la famille Péloquin dite Félix, c'est à savoir : aux huit enfants

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ci-haut mentionnés, nés du mariage de Catherine Paul Hus avec le dit Michel Péloquin dit Félix, et subdivisible en seizièmes dans la totalité des dits biens, appartient aujourd'hui à Pierre Péloquin et Théophile Péloquin dit Félix, deux des défendeurs, pour chacun un seizième; à la défenderesse, Marguerite Latraverse, femme du dit Paul Péloquin dit Félix, et sa légataire, pour un autre seizième, à Edwidge Péloquin, femme de Joseph Bibeau, tous deux défendeurs, pour un seizième encore, à Véronique Péloquin dite Félix, femme de Paul Rajotte, tous deux défendeurs, pour un seizième, à Catherine Péloquin, femme d'Olivier Paul Hus, tous deux défendeurs, pour un autre seizième, à Lucile Bigné alias Billier, la demanderesse, veuve de feu Alexis Péloquin, comme légataire de ce dernier, pour un autre seizième, et à Paul Péloquin dit Félix, Julie Péloquin dite Félix, épouse de Maxime Olivier, Catherine Péloquin dite Félix, épouse de Charles Olivier, et Esther Péloquin dite Félix, femme de Henri Collin dit Laliberté, enfants issus du mariage du dit Paul Péloquin dit Félix avec Catherine Bibeau, pour chacun un quart de seizième, afférant au dit Paul Péloquin dit Félix, faisant un soixante-quatrième, pour chacun d'eux, dans la totalité des dits biens. Considérant enfin, que les de landeurs, ne pouvant être tenus de demeurer dans l'indivis, out le droit de demander de partager avec les défendeurs dans les parts et proportions ci-haut indiquées, les biens ci-haut mentionnés, et que leur demande est bien fondée dans les limites tracées par la présente sentence, et qu'il y a lieu d'ordonner le partage, si les biens peuvent se partager commodément, sinon, la licitation d'iceux : Déclare les parties propriétaires des dits biens, dans les proportions ci-dessus établies, et ordonne, avant faire droit à la demande en partage que, par trois experts dont conviendront les parties, sinon nommés d'office par le tribunal, suivant la pratique ordinaire, il sera en la forme accoutumée, et après serment prêté devant un commissaire nommé pour recevoir les affidavits à être lus et publiés devant le tribunal, constaté si les dits biens peuvent se partager commodément, et de quelle manière, et sous quelles conditions doit se faire le partage, et feront les dits experts rapport de leurs opérations le ou avant le premier jour du terme prochain de la cour, pour, sur leur rapport et expertise, être ordonné ce que de droit, dépens réservés."

La Cour Supérieure avait ordonné le partage entre les demandeurs et les défendeurs, de la moitié indivise d'une terre désignée sous la lettre B., tandis que, par les admissions des parties au dossier, c'était la moitié nord-est de cette terre qui était sujette à partage; car l'autre moitié divise appartenait à des tiers, et de plus, le partage d'une terre située en

Paul Hus la paroisse de Sorel, de sept perches et deux pieds de front, sible en seisur vingt-quatre arpents de profondeur, bornée en front au ijourd'hui à fleuve Saint-Laurent, en profondeur à la baie de Lavallière, x, deux des d'un côté par Joseph Paul, et de l'autre côté par Pierre Laeresse, Martraverse; tandis que, suivant telles admissions, ce n'était que lit Félix, et sept perches et deux pieds de front dans toute sa largeur, sur e Péloquin, toute sa profondeur, qui étaient partageables, lesquelles sept pour un seiperches et deux pieds devaient être prises dans la totalité de , femme de cette terre ensuite des trois perches vendues par le shérif. seizième, à Ce jugement fut porté en appel par les défendeurs, à rai-on , tous deux de plusieurs griefs, et entre autres par suite des erreurs Bigné alius ci-dessus exposées. (1) Les intimés par leur réponse aux quin, comme griefs des appelants niant toutes les allégations de ces dere, et à Paul niers, ajoutèrent ce qui suit : "That, nevertheless respondents épouse de admit that there is a technical error in the judgment pro-, épouse de nounced by the Court below, which appellants were bound to , femme de have noticed at the time of the rendering of the judgment, riage du dit and which could then have been corrected, that is to say: By pour chacun the judgment, the undivided half of the land described under in dit Félix, the letter B. is ordered to be divided, while the north east half only should be divided as alleged by the appellants in eux, dans la de landeurs, their sixteenth reason of Appeal; that, by the judgment, , out le droit seven perches and two feet only of the land described under ins les parts letter D. is to be divided by the depth fixed by the surveyor mentionnés, Dignan, that the seventeenth reason of appeal admits this, nites tracées the appellants however desire that the names of the actual ordonner le neighbors should be entered instead of those of their predeément, sinon, cessors, this the respondents do not object to and approve. aires des dits Wherefore the respondents pray that the said reasons of appeal be set aside, and that the judgment of the Superior et ordonne, ue, par trois Court be maintained, subject to the correction of the technmés d'office nical errors therein contained. The whole with costs." l sera en la nt un com-

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ère, et sous eront les dits t le premier r rapport et servés."

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⁽¹⁾ Un appel, institué simplement pour réparer une erreur manifeste existant dans le jugement de la cour de première instance, sera rejeté, avec dépens, lorsque la partie pouvant tirer avantage de cette erreur s'en désiste par un acte de désistement produit au greffe, et qu'elle donne avis de ce desistement à la partie adverse avant la signification du bref d'appel. (Brown et al., et Wood, C. B. R., en appel, Montréal, 12 novembre 1863, LAFONTAINE, J. en C., DUVAL, J., MEREDITH, J., et MONDELET, J. A., confirmant le jugement de C. S., Bedford, 15 mai 1862, 8 J., p. 53, et 13 R. J. R. Q., p.

Lorsque jugement final a été rendu dans une cause, la Cour n'a pas le droit, sur motion ou autrement, de le modifier ou changer. (Huot vs Payé, C. S., Québec, 2 mai 1859, Chabot, J., 9 D. T. B. C., p. 226, et 7 R. J. R. Q. p.,

Un jugement ne peut être changé ou altéré après l'ajournement de la Cour qui l'a rendu. (Bertrand vs Gugy, C. C., Québec, 25 mai 1859, STUART, J. A.,
D. T. B. C., p. 260, et 7 R. J. R. Q., p. 225)
Vide Ross et Palsgrave, 16 R. J. R. Q., p. 54.

Le jugement est confirmé en appel et est modifié comme suit : "Considérant, qu'à part une erreur dans la description de deux immeubles décrits dans le jugement dont est appel; il n'y a pas mal jugé, confirme le dit jugement, sauf et excepté quant à la description de l'immeuble B. qui doit se lire comme suit: "La moitié divise nord-est d'une terre," sauf aussi quant à la description de l'immeuble D. qui doit se lire comme suit: "sept perches et deux pieds de front, sur vingtquatre arpents de profondeur, dans une terre située en la paroisse de Sorel, d'un arpent et sept perches de front, sur 24 arpents de profondeur, bornée, etc. ensuite des trois perches vendues par le shérif," et desquels immeubles, ensémble avec les autres immeubles correctement décrits dans le jugement de la Cour de première instance, il sera disposé ainsi qu'ordonné par ledit dernier jugement, et la Cour condamne les appelants à payer aux intimés les frais par eux encourus devant cette Cour." (3 R. L., pp. 52, 386.)

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LAFRENAYE, avocat des appelants.

ARMSTRONG & GILL, avocats des intimés.

INTERDIT .- CURATEUR.

COUR DE CIRCUIT, district de Richelieu, Sorel, 27 septembre 1869.

Coram T. J. J. LORANGER, J. C. S.

John George Crebassa, demandeur, vs Narcisse Fourquin dit Léveillée, et Léonard Parent, en sa qualité de curateur dûment élu en justice, au dit Narcisse Fourquin dit Léveillée, interdit, pour cause de prodigalité, défendeur, et Pierre Bergeron, et Louis Fourquin dit Léveillée, et le dit Léonard Parent, tiers-saisis.

Jugé:—Que l'on peut émaner un bref de tierce-saisie contre le curateur d'un interdit, pour l'obliger à payer au demandeur le montant qu'il doit personnellement à l'interdit, pour un jugement rendu contre l'interdit et le dit curateur, en sa dite qualité. (1)

La Cour, après avoir entendu le demandeur, par son avocat, les défendeurs et le dit tiers-saisi Léonard Parent ayant fait défaut, et les autres tiers saisis ayant comparu et fait leur déclaration suivant que requis, et le demandeur ayant inscrit

⁽¹⁾ Cette cause nous paraît décider une question importante, quoiqu'elle n'ait pas été soulevée par la plaidoirie. Voir aussi le jugement qui est rapporté à la page 386, rendu par la cour d'appel, à Montréal.

lifié comme description t est appel; f et excepté lire comme sauf aussi doit se lire t, sur vingtsituée en la le front, sur s trois peres, ensémble lans le jugelisposé ainsi r condamne

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tre le curateur montant qu'il du contre l'in-

r son avocat, ayant fait a et fait leur ayant inscrit

nte, quoiqu'elle ent qui est rappour jugement par défaut contre le dit Léonard 1 arent, condamne le dit Léonard Parent à payer au demandeur la somme de \$38.70, montant en capital et frais du jugement rendu en faveur du demandeur contre le dit Narcisse Fourquin, avec intérêt sur \$24, du 11 juin dernier, le tout avec dépens, contre le dit défendeur Fourquin, et sauf le recours du dit Léonard Parent, contre ce dernier (3 R. L., p. 57.)

APPEL DES JUGEMENTS DES JUGES DE PAIX.

Cour de Circuit, district de Richelieu, Sorel, 17 mai 1871.

Coram L. V. SICOTTE, J. C. S.

PIERRE PÉLOQUIN, appelant, vs PAUL LAMOTHE, intimé.

Jugė:—1° Que le Code de l'rocédure Civile n'a pas enlevé le droit d'appel des jugements rendus par les juges de paix, sous la loi d'agriculture.

2º Qu'il est permis à l'intimé, dans le cas où l'appelant n'a fait que donner avis d'appel et procéder au cautionnement, mais n'a pas fait signifier le bref d'appel d'un jugement rendu sous l'ac.e d'agriculture, de faire motion pour faire déclarer cet appelant déchu de son droit d'appel.

L'intimé Lamothe obtint, le 20 mars 1871, contre l'appelant Péloquin, un jugement, sous l'acte d'agriculture. Péloquin donna avis de son intention d'appeler, conformément au statut 24 Victoria, chap. 30, mais il ne fit signifier aucun bref d'appel. Le 10 mai 1871, Lamothe fit motion, qu'attendu que le dit appelant a négligé de faire signifier aucun bref d'appel, dans les délais prescrits par la loi, à l'intimé ou à son procureur, et au dit greffier du dit juge de paix, cette honorable Cour déclare forfaits tous les droits et réclamations fondés sur cet appel, avec dépens.

Per Curian: L'appel est accordé dans les matières dont il s'agit, par le statut. Ce statut n'a pas été abrogé, la Cour devant laquelle l'appel devait être porté, n'a pas été changée ou abrogée. Le Code de P. C. n'a voulu qu'énumérer les pouvoirs généraux des tribunaux en existence. La loi sur la codification ne donnait pas autorité pour modifier les constitutions des Cours. Le Code n'a abrogé aucun des statuts par lesquels il y avait appel des Cours inférieures, dans des cas particuliers, et sur des matières spéciales. Il ne contient aucune disposition qui, implicitement ou explicitement, ait abrogé le droit d'appel dans l'espèce. Ce droit ne pouvait être abrogé que par des dispositions expresses: et, d'ailleurs, l'article 1220 reconnaît le droit d'appel des tribunaux inférieurs, tel qu'il est réglé par

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les statuts particuliers concernant ces tribunaux. "Dans tous les cas où l'appel n'est pas donné des tribunaux inférieurs ci-dessus mentionnés, le moyen d'évoquer la cause avant jugement ou de faire reviser le jugement rendu, est le bref de certiorari, à moins que ce recours même ne soit refusé par la loi." (1) La forfaiture peut être demandée contre l'appelant, quoiqu'il n'ait procédé qu'au cautionnement. L'intimé a intérêt de faire cesser tout doute sur son droit consacré par un jugement. Dans cette éventualité, la forfaiture sera accordée, avec les frais que le tribunal croira devoir fixer. La motion pour la forfaiture est accordée, avec dépens de \$3. (3 R. L., p. 58.)

A. GERMAIN, avocat de l'appelant. J. B. BROUSSEAU, avocat de l'intimé.

SAISIE-ARRET.—TUTEUR.

Cour du Banc de la Beine, en appel, Montréal, 10 décembre 1870.

Coram Duval, J. en C., Caron, J., Badgley, J., Drummond, J. et Monk, J.

Joseph Dorion, demandeur en Cour de première instance, appelant, et Elmire Dumont, ès-qualité de tutrice, défenderesse en Cour de première instance, et la dite Elmire Dumont, ès-nom personnel, Tiers-Saisie en Cour de première instance, intimée, et le dit Joseph Dorion, contestant la déclaration de la Tiers-Saisie en Cour de première instance.

Jugé:—Que la tierce-saisie, émanée à la poursuite d'un créancier, pour saisir et arrêter, entre les mains du tuteur personnellement, toutes les sommes d'argent qu'il peut devoir au tuteur, est nulle et illégale, vu que le compte du tiers-saisi, comme tuteur, ne peut être débattu par la contestation de la déclaration sur saisie-arrêt, mais ne doit l'être que par une contestation directe avec la partie intéressée.

L'appelant, cessionnaire d'un nommé Francis Metzler, a fait déclarer exécutoire contre Elmire Dumont, un jugement que celui-ci avait obtenu contre son mari, feu Pierre Laviolette, le 18 février 1826, pour la somme de £101. 10s. 8d. Elmire Dumont avait été assignée, tant en sa qualité de tutrice aux

⁽¹⁾ Depuis la mise en vigueur du Code de Procedure Civile, il n'y a pas droit d'appel, à le Cour de Circuit, des jugements rendus par les juges de paix en vertu de la loi d'agriculture. (Duppel vs Rochon, C. C., Ste-Schenstique, 17 octobre 1870, BERTHELOT, J. 2 R. L., p. 572, et 21 R. J. R. Q., p. 91.)

"Dans tous x inférieurs e avant juget le bref de refusé par la e l'appelant, ntimé a intérasacré par un era accordée, r. La motion \$3. (3 R. L.,

embre 1870.

Drummond, J.

nière instance, de tutrice, déce, et la dite Saisie en Cour SEPH DORION, sie en Cour de

n créancier, pour ment, toutes les e et illégale, vu re débattu par la e doit l'être que

Metzler, a fait jugement que rre Laviolette, ls. 8d. Elmire te tutrice aux

Civile, il n'y a pas par les juges de C. C., Ste-Schoet 21 R. J. R. Q., enfants mineurs issus de son mariage avec feu Pierre Laviolette, que comme commune en biens, mais elle ne fut point condamnée en cette dernière qualité; il fut déclaré que ce jugement ne serait exécutoire que contre les héritiers de son mari. Le 3 novembre 1860, l'appelant a poursuivi l'exécution de ce jugement, par voie de saisie-arrêt, et a assigné Elmire Dumont à venir déclarer quelles sommes d'argent elle devait personnellement ou avait entre ses mains appartenant à la défenderesse. La saisie comporte : "Vous suisirez et arrêterez toutes les sommes d'argent, etc., que vous pourrez trouver entre les mains de Dame Elmire Dumoni, appartenant ou dues, etc., à Dame Elmire Dumont, comme tutrice dûment élue en justice à Adélaïde, Victorine, Antoine, Alfred, Frédéric et Arthur, enfants mineurs issus de son mariage avec le dit feu Pierre Laviolette." Le 7 décembre 1860, elle a déclaré qu'elle ne devait personnellement aucune somme d'argent à la défenderesse en qualité de tutrice. L'appelant a contesté cette déclaration. Le 30 mai 1866, la contestation de la déclaration de la tiers-saisie a été renvoyée par le jugement de l'honorable juge Smith, dont suit le libellé: "The Court having heard the parties upon the merits of the contestation and moyens of contestation made by plaintiff to the declaration of Elmire Dumont, as Tiers-Saisie; considering that the account of indebtedness of the Tiers-Saisie, as tutrix to her minor children, and the adjustement of the amount due, if any by the Tiers-Saisie, in her said capacity to said minors, cannot be litigated or settled in a case of a contestation of a declaration on a Suisie-Arrêt, but must be settled by direct contestation with the party interested, the Court doth dismiss the contestation and moyens of contestation of Plaintiff, with costs."

Prétentions de l'appelant : L'appelant ne demandait point à madame Laviolette un compte des sommes d'argent qu'elle pouvait avoir entre ses mains en sa qualité de tutrice. Il n'en avait point le droit, sous les circonstances, ainsi qu'il sera ci-après expliqué. Son objet eût-il été tel, il n'eût pas procédé par la voie de la saisie-arrêt. Il demandait simplement à madame Laviolette de venir déclarer si elle était redevable en aucune manière personnellement, à la tutrice des enfants mineurs de son mari; et il est démontré qu'en effet elle a reçu des sommes considérables de la communauté de biens qui a existé entre elle et feu Pierre Laviolette, et dont elle n'a tenu aucun compte à la tutrice. L'appelant, par sa contestation, reprochait à la tiers-saisie d'avoir déclaré une fausseté, en disant qu'elle ne devait rien à la tutrice des enfants mineurs de feu son époux, tandis qu'à cette époque elle avait entre les mains

une somme de \$1,869.241, dont elle lui était redevable, et voici de quelle source lui était venue cette somme. Dame Laviolette (la tiers-saisie) et Virginie Dumont, sa nièce, épouse de Charles A. M. Globensky, étaient propriétaires, par indivis, de la seigneurie des Mille Isles, et en avait joui pendant longtemps dans les proportions -uivantes, savoir : du 1er novembre au 26 déc. 1841, dame Globensky, pour une moitié, et dame Laviolette pour un quart, l'autre quart étant possédé par Sévère Dumont (frère de la tiers-saisie). Le 26 décembre 1841, Sévère Dumont mourut, et dame Globensky a continué à recevoir les fruits et revenus de la seigneurie, dans la proportion de deux tiers pour elle-même, et sa tante dame Laviolette, dans la proportion d'un tiers seulement. La raison de cette disproportion venait de l'erreur où étaient les parties sur le droit d'ainesse que dame Globensky s'attribuait sur la seigneurie. Le 4 octobre 1852, dame Laviolette niant le droit d'ainesse de dame Globensky, intenta une action contre elle, pour faire limiter ses droits à une moitié seulement, et partager en conséquence. Par jugement du tribunal de première instance, confirmé en appel, le 11 octobre 1854, (présent les honorables juges PANET. AYLWYN, MEREDITH & CARON), il fut déclaré que le droit d'ainesse n'avait jamais existé, et le même jugement condamnait dame Globensky à rembourser à dame Laviolette ce qu'elle avait recu au-delà d'un tiers, du 1er novembre au 26 décembre 1841, et au-delà de la moitié dépuis cette dernière époque, au temps de l'institution de l'action. Mme Globensky menaça d'appeler de ce jugement au Conseil Privé, mais les parties en vinrent à un arrangement. Par acte passé à St-Eustache, devant Mtre Labelle, le 21 septembre 1855, dame Globensky s'engagea à payer à l'intimée une somme de \$4,000 pour lui tenir lieu de remboursement des revenus de la seigneurie, dont elle lui était redevable en conformité du jugement de la Cour d'Appel. Cette somme fut payée à l'intimée, ainsi que le constate la quittance du 8 octobre 1855, passée devant le même notaire, pour lui tenir lieu de l'excédent des revenus depuis le 1er septembre 1841 au 1er novembre 1854, les ma c'est-à-dire, pour une période de 13 ans. Cette somme étant mêmes portée en total, sans faire la différence dans la recette des diverses années, doit se répartir par troisième pour chaque lui fus ďéduc année, faisant une proportion annuelle de \$307.69. A venir iusqu'à l'époque du 25 octobre 1852, l'intimée était en com payer munauté de biens avec feu Pierre Laviolette, et, naturelle cela d'a ment, cette communauté est devenue créancière de ces arré d'une a rage de revenus depuis le 1er novembre 1841, c'est-à-dir compri pendant une période de dix ans et onze mois et vingt-trois pelant, jours, faisant une somme de \$3,378.40, comme étant sa par en déta proportionnelle dans la dite somme de \$4,000. Après la mor leurs, r

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de son époux, l'intimée a accepté la communauté sous bénéfice d'inventaire. Dans l'acte de transaction ci-haut cité, elle comparut, taut comme grevée de substitution, pour tout ce qui concerne le partage des immeubles, comme tutrice de ses enfants mineurs, se faisant fort pour les majeurs, que comme commune en biens, sous réserve de son bénéfice d'inventaire. Comme commune, sa part était de la moitié de la somme de \$3378.40, représentant les arrérages de revenus dûs à la mort de son mari, ou \$1689.241, une pareille somme appartenant à sa succession. Elle a reçu cette somme de \$1689.241, comme commune, toujours sous bénétice d'inventaire, (l'autre moitié lui avait été payée comme tutrice.) Plus tard l'intimée a renoncé à la communauté de biens, et par le fait de cette renonciation elle est devenue responsable du remboursement de cette somme à la succession de son mari, représentée à l'époque de l'émanation du bref de saisie-arrêt par les mineurs, dont elle est tutrice. Elle n'a jamais remboursé cette somme dont elle est débitrice en son nom personnel. L'appelant avait donc raison de l'assigner à venir déclarer quelles sommes elle devait, en son nom personnel, à Elmire Dumont, tutrice des enfants mineurs de feu Pierre Laviolette. L'intimée se plaint, par sa réponse à la contestation, du fait que l'on a procédé à l'exécution du jugement rendu contre elle en sa qualité de tutrice, par voie de saisie-arrêt, tandis que l'on aurait dû prendre l'action directe pour lui faire rendre compte de sa gestion, et lui donner par là, l'avantage de faire valoir ses réclamations contre ses pupilles, pour frais d'entretien, d'éducation et autres frais, qu'elle détaille dans un plaidoyer subséquent. Il est bon de dire de suite que l'intimée n'a fait aucune preuve quant à ses prétendues réclamations contre les mineurs, et n'a donné aucune explication sur l'emploi qu'elle a fait des sommes d'argent qu'elle a reçues en sa qualité de commune en biens avec feu Pierre Laviolette. Rien n'empêchait que la défenderesse ne justifiât, sur cette saisie-arrêt comme dans une action en reddition de compte, des réclamations novembre 1854, qu'elle pouvait avoir contre les mineurs. L'argent ainsi entre les mains de l'intimée tiers-saisie, était la propriété de ces mêmes mineurs. La défenderesse, en supposant que ceux-ci ne pour chaque lui fussent redevables en aucune somme de deniers, pour frais 307.69. A venir d'éducation et entretien, pouvait faire valoir sa créance, et se ée était en com payer à même la somme saisie. Il n'était pas nécessaire pour cela d'avoir recours au moyen toujours long et dispendieux ière de ces arré d'une action en reddition de compte. L'intimée l'a fort bien sere de ces arte compris, puisque, tout en se plaignant de la procédure de l'ap-set vingt-trois pelant, elle a, malgré cela, dans une seconde exception, énoncé ne étant sa par en détail toutes ses prétendues réclamations contre les mi-Après la mor neurs, réclamations que plus tard elle n'a pas jugé à propos de

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prouver. L'appelant soumet qu'il avait droit de poursuivre l'exécution de son jugement comme il l'a fait. Le tuteur n'est comptable de sa gestion que lorsqu'elle finit. Art. 308 du Code C.B.C. Le créancier n'a d'action contre lui pour lui faire rendre compte des deniers qu'il a en mains qu'à l'expiration de sa tutelle. Il peut bien exiger de lui un compte sommaire de son administration, mais il ne peut, pas plus que les mineurs euxmêmes, exiger qu'il paye les deniers qu'il a en mains. D'un autre côté, le créancier n'est jamais exposé à perdre des délais inutiles pour attendre l'heure de cette reddition de compte finale. Il peut exécuter ses jugements contre les biens des mineurs quand bon lui semble, sauf à observer les formalités nécessaires suivant qu'il s'adresse à des immeubles cu à des biens meubles; dans le cas actuel c'est une saisie-arrêt, pour arrêter, entre les mains d'un tiers, des sommes d'argent dues aux mineurs. Assurément, on ne peut pas nier aux créanciers des mineurs le droit d'exécuter leurs jugements par le moyen de la saisie-arrêt, aussi bien que par tout autre voie d'exécution. Il n'est rien dans les lois qui fasse obstacle à ce qu'ils se payent de leur dû sur tous les biens des mineurs, de quelque nature qu'ils soient, et en quelques mains qu'ils se trouvent. Toute la question serait donc de savoir si le fait que la tierssaisie, Elmire Dumont, est elle-même tutrice et condamnée comme telle à payer à l'appelant le montant réclamé, empêche que l'on puisse saisir entre ses mains ce qu'elle doit personnellement aux mineurs. Comme il a été dit ci-dessus, elle a reçu quatre mille piastres, dont partie lui a été payée pour les mineurs, et partie pour la communauté de biens qui avait existé entre feu Laviolette et elle. Elle a renoncé à cette communauté, et a retenu entre ses mains la somme qu'elle avait reçue pour la dite communauté. Les créanciers de la succession de Pierre Laviolette n'ont-ils pas le droit de saisir cette somme d'argent? Et comment pouvaient-ils le faire si ce n'est par voie de saisie-arrêt?

Prétentions de l'intimée: L'intimée répondit à la contestation, d'abord, par une réponse en droit alléguant: que la saisie-arrêt avait été émanée pour saisir, entre les mains de l'intimée personnellement, les sommes de deniers, etc., appartenant ou dues à l'intimée comme tutrice, tandis que le jugement evait été rendu contre elle, en sa dite qualité de tutrice; que l'appelant n'alléguait aucun fait, dans sa contestation, établissant que l'intimée avait entre les mains des deniers, etc. appartenant ou dus, ou pouvant lui devenir dus en sa qualité de tutrice: que l'acte invoqué par l'appelant montre que la somme par elle reçue en vertu du dit acte ne lui a été payée qu'en sa qualité de tutrice; que la seule responsabilité de l'intimée, vis-à-vis de ses enfants mineurs, n'était et ne pouvait être

de poursuivre Le tuteur n'est rt. 308 du Code ui faire rendre piration de sa mmaire de son mineurs euxn mains. D'un rdre des délais tion de compte les biens des les formalités ubles cu à des sie-arrêt, pour d'argent dues aux créanciers par le moyen e voie d'exécue à ce qu'ils se irs, de quelque ils se trouvent. it que la tierset condamnée lamé, empêche lle doit personi-dessus, elle a payée pour les biens qui avait cé à cette come qu'elle avait s de la succesde saisir cette faire si ce n'est

dit à la conteséguant: que la re les mains de ers, etc., apparlis que le jugelité de tutrice; a contestation, es deniers, etc., s en sa qualité montre que la lui a été payée abilité de l'inre pouvait être qu'en qualité de tutrice; que l'intimée ayant reçu ces sommes d'argent en sa qualité de tutrice, étant comptable d'icelles à ses enfants, l'appelant ne pouvait tout au plus exiger un compte, qu'elle avait droit d'imputer sur le montant par elle reçu les sommes par elle payée pour l'éducation et l'entretien des mineurs. Par une seconde réponse l'intimée allègue : que la transaction du 21 décembre 1855, couvrait tous les arrérages dus et accrus pendant plusieurs années, jusqu'à cette date; qu'elle était separée de biens d'avec son mari, par jugement du 25 octobre 1852, et qu'elle avait, par conséquent, seule droit aux arrérages accrus depuis cette date jusqu'au jour de la transaction, ce qui formait une proportion considérable de la somme perçue, tels revenus étant beaucoup plus considérables dans les dernières années, et qu'elle était bien fondée à s'approprier la moitié des mille louis par elle perçus pour les dits arrérages; que, sur la balance des cinq cents louis, il lui avait fallu payer les frais funéraires de son époux, savoir, £79 1s. 7d.; que, par l'inventaire des biens de la succession, il appert qu'il est dû par la communauté £1,591 6s. 3d. n'y avant aucuns autres biens dans la succession que les £500 dus aux mineurs; que de plus, elle avait dépensé pour l'entretien et l'éducation des mineurs, et pour réparations et constructions sur leur propriété, une somme plus que suffisante pour absorber leur part dans les dits deniers; qu'elle était prête à fournir un compte constatant les faits ci-haut énumérés. Les parties procédèrent à la preuve. L'appelant interrogea l'intimée sur faits et articles, et comme témoin. Ce fut la seule preuve produite au soutien de ses prétentions, avec l'acte de transaction relaté dans sa contestation. L'intimée, par ses réponses, confirma ses allégués, et l'appelant ne peut trouver en dehors de l'acte aucune preuve pour justifier ses prétentions. L'intimée produisit les divers actes et obligations constatant les créances qu'elle avait acquit'es; elle établit, en outre, que les frais d'éducation et de maintien de ses enfants étaient plus que suffisants pour absorber seuls, en dehors de tout autre paiement, le montant que les enfants, à titre d'héritiers de leur père, pouvaient prétendre dans la somme reçue dans la transaction en question. Cette somme, d'ailleurs, de même que tout autre meuble qu'elle pouvait avoir appartenant à la succession n'était pas en sa possession en son nom personnel; ce n'était que comme tutrice à ses enfants mineurs qu'elle pouvait en être redevable. Ce qu'elle devait en cette qualité était un compte, et non une partie de la créance que les mineurs avaient contre elle. L'appelant ne pouvait pas procéder directement à obtenir aucune partie du reliquat dont elle pouvait être ultérieurement reliquataire. Il ne pouvait et ne devait demander qu'un compte, en sa qualité de créancier des mineurs, lesquels

représentaient seuls la succession de son débiteur. Ce compte quoiqu'il ne fût pas demandé, l'intimée le rend, sans qu'elle en fut tenue, et il appert par le dossier, que tout ce qui pouvait revenir aux mineurs a été absorbé avant qu'aucune demande n'ait été faite par l'appelant. Si, en pareille circonstance, il était permis à un créancier de prendre une saisie-arrêt contre un tuteur, en son nom personnel, et obtenir contre lui une condamnation pendant la tutelle, pour qu'il lui soit payé isolément un item de la recette, sans égard aux charges et dépenses, et sans tenir compte des droits des autres créanciers sur cette somme, il n'y aurait plus de garantie possible pour les mineurs, et la confusion qui en résulterait pour le tuteur rendrait l'exécution de la tutelle impossible, et préjudicierait également aux créanciers en général, qui ont, en cas d'insolvabilité de la succession du père, un droit égal à une proportion des biens reçus par le tuteur. Si l'on arrive ensuite à examiner les détails donnés par l'intimée sur cette somme de deniers, le seul bien que l'appelant prétend appartenir à la succession de son débiteur, l'on trouve que la plus forte partie appartient à l'intimée comme représentant les fruits et revenus d'un immeuble propre à elle, et qu'en défalquant sur la balance les dettes privilégiées et les dettes hypothécaires acquittées par elle, l'appelant ne pouvait assurément rien obtenir, de sorte que, en loi et en équité, en mettant de côté toutes les objections que la loi oppose à sa réclamation quant au mode par lui adopté, il n'aurait même aucun intérêt à procéder contre l'intimée.

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Le jugement de la Cour Supérieure fut confirmé par la Cour du Banc de la Reine, nemine contradicente. (3 R. L., p. 60).

LORANGER & LORANGER, avocats de l'appelant. R. et G. LAFLAMME, avocats de l'intimée.

CAUTIONS JUDICIAIRES .- CONTRAINTE PAR CORPS.

COUR SUPÉRIEURE, Montréal, 21 novembre 1871.

Coram Torrance, J.

DUMONT VS DORION et al.

Jugét:—Que les cautions données de poursuivre effectivement l'appel en vertu des art. 1124 et 1125 du Code de Procédure Civile. sur les appels de la cour Supérieure, sont des cautions judiciaires sujettes à la contrainte par corps. (1)

⁽¹⁾ Vide Art. 1930, 1962 et 2272, n° 3, C. C.; Bell vs Côté, 20 R. J. R. Q., p. 239, et Winning et al. vs Leblanc et al., 20 R. J. R. Q., p. 522.

c. Ce compte sans qu'elle ce qui pouqu'aucune decirconstance, e saisie-arrêt nir contre lui lui soit payé ux charges et res créanciers possible pour our le tuteur préjudicierait en cas d'insolà une proporrive ensuite à tte somme de partenir à la us forte partie fruits et revealquant sur la othécaires acent rien obteettant de côté amation quant intérêt à pro-

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é, 20 R. J. R. Q., p. 522.

Le 30 septembre 1871, une demande fut rapportée en Cour Supérieure, à Montréal, à la requête de la demanderesse, contre les défendeurs, en leur qualité de cautions en faveur de Joseph Dorion, appelant devant la Cour du Banc de la Reine en appel. Le cautionnement donné par les deux défendeurs, bail bond, le 1er juin, était en la forme ordinaire, art. 1124 et 1125 du C. de P. C. La demanderesse réclamait des défendeurs le montant des frais sur les jugements rendus en sa faveur, en appel, le 10 décembre 1870, et, en Cour inférieure, le 30 mai 1866, et concluait à leur condamnation conjointement et solidairement, et à la contrainte par corps. Les défendeurs opposèrent à cette action une défense au fond en droit, à cette partie des conclusions de la déclaration de la demanderesse au sujet de la contrainte par corps, sur le principe qu'ils n'étaient pas contraignables par corps, qu'ils n'étaient pas cautions judiciaires; mais n'étaient que des cautions légales. Après audition en droit, la Cour Supérieure déboute les défendeurs de leur défense en droit, par son jugement motivé comme suit: "The Court, seeing that defendants are cautions judiciaires, and, therefore, liable to contrainte par corps, doth reject the défense en droit, with costs." (3 R. L., p. 360.)

LAFLAMME, HUNTINGTON & LAFLAMME, avocats de la de-

manderesse.

TRUDEL & DE MONTIGNY, avocats des défendeurs.

VENTE DE CREANCES.

COUR DE CIRCUIT, district de Richelieu, Sorel, 4 juillet 1871.

Coram L. V. SICOTTE, J. C. S.

ROBERT HENRY KITTSON, demandeur, vs Joseph Delisle, défendeur, & J. D. H. LÉCUYER, tiers-saisi, & Joseph Delisle, contestant, & Henry Vassal, intervenant.

Jugé: Que le cessionnaire d'une créance constatée par un jugement a droit de faire exécuter ce jugement au nom du cédant, nième lorsque le demandeur est en faillite, et n'a jamais obtenu sa décharge de ses créanciers.

Le 31 janvier 1859, le demandeur obtint jugement contre le défendeur, pour \$125.88 et les dépens taxés à \$24.76. Le 2 juillet 1869, il fit cession de ses biens à T. Sauvageau, syndic officiel, sous l'acte de failite de 1864. Le 2 mars 1871, Henry Vassal, le propriétaire actuel de cette créance, fit émaner une saisie-arrêt, au nom du demandeur, pour arrêter, entre les mains du tiers-saisi, toutes les sommes de deniers qu'il pouvait devoir au défendeur. Le défendeur contesta la tierce-saisie, alléguant que le demandeur n'a pas d'intérêt à poursuivre l'exécution du jugement et n'en est plus le propriétaire; que, le 2 juillet 1869, le demandeur a fait, sous l'acte de faillite 1864, et ses amendements, cession de ses biens à T. Sauvageau, syndic officiel, par acte reçu devant Isaacson, notaire, à Montréal, et que le jugement dont le demandeur poursuit l'exécution, faisait alors partie de

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JUGEMENT: La cour, après avoir entendu l'intervenant et Delisle, sur la contestation par ce dernier, de la saisie-arrêt après jugement émanée en cette cause. Attendu, en fait, que la dette dont le paiement est réclamé est constatée par un jugement, rendu le 31 janvier 1859; attendu, en fait, que cette dette, par la faillite de Senécal, qui l'avait acquise des créanciers du demandeur, par acte en date du 21 décembre 1866, a été placée sous le contrôle du syndic Sauvageau, qui aux termes de la loi représente le failli, et peut exercer pour le recouvrement des dettes, toutes les actions et procédés que ce dernier pouvait prendre et exercer; attendu, en fait, que le syndic Sauvageau a vendu cette dette à Vassal, l'intervenant, suivant qu'il appert par l'acte du 18 février 1870; attendu. en fait, qu'aucun transport ou vente de cette dette n'a été signifié au défendeur, le débiteur, ou au tiers-saisi. Considérant que les créanciers du demandeur étaient par l'acte du 13 novembre 1866, bien saisis de cette dette; que le syndic Sauvageau, par la faillite de Senécal, qui en était alors propriétaire et créancier, en fut également bien saisi, par l'effet de la loi seule, et que la vente qu'il en a faite à Vassal a également bien saisi ce dernier de la dette; considérant que Vassal pouvait faire exécuter le jugement de 1859, au nom du demandeur; considérant que Vassal a droit d'intervenir pour veiller à ses intérêts dans l'instance, recevoir les deniers dus et à percevoir, et peut donner valable décharge au débiteur; considérant que le défendeur, en payant à Vassal, sera valablement déchargé, et ne pourra être inquiété par les personnes qui peuvent avoir des transports de cette dette, mais qui ne les ont pas fait signifier, il suit qu'il est sans intérêt à contester, comme il a fait, le déclare mal fondé dans sa contestation, maintient l'intervention, déclare la saisie-arrêt bonne et valable. (3 R. L., p. 69.)

BARTHE & BRASSARD, avocats du défendeur.

A. GERMAIN, avocat de l'intervenant.

CONTRAINTE PAR CORPS .- PEREMPTION D'INSTANCE.

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nsidérant que 1859, au nom

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COUR SUPÉRIEURE, district de Richelieu, Sorel, 5 juillet 1871.

Coram L. V. SICOTTE, J. C. S.

DAME HENRIETTE CHAFFERS, ès-qualité, vs Louis Pétrin.

Jugé: Qu'une requête pour contrainte par corps contre une personne qui détériore une propriété saisie n'est pas une instance, et n'est pas sujette à la péremption après trois ans écoulés depuis les derniers errements.

Dans une requête présentée à la Cour Supérieure, on alléguait qu'un certain immeuble était sous saisie, dans une cause où la requérante était demanderesse, et J. G. Crébassa et al., défendeurs, et que Louis Pétrin avait, à plusieurs reprises coupé du bois sur ledit immeuble, et l'avait détérioré, et en avait diminué la valeur pour une somme d'au moins \$40, et on concluait à la contrainte par corps. Le 12 mai 1871, Louis Pétrin présenta à la cour une requête exposant: "Que la demanderesse et requérante n'a fait aucun procédé depuis plus de trois ans, comme il appert par le certificat du protonotaire; que, vu ce que dessus, il est bien fondé à demander que la présente instance et la procédure en icelle soient déclarées périmées." Conclusion à la péremption d'instance. Requête rejetée avec dépens. (3 R. L., p. 71.)

COURS D'EAU.-MOULINS.

COUR SUPÉRIEURE, district d'Arthabaska, 1er septembre 1869.

DAVID BLAIS, fils, vs JOSEPH AUGER, et LE DIT JOSEPH AUGER, demandeur en garantie, & LOUIS-NAPOLEON LAROCHELLE, défendeur en garantie.

Jugė: Que, par l'acte des Statuts Refondus B. C., chap. 51, un propriétaire a le droit d'utiliser une rivière traversant son immeuble et celui de son voisin, en y construisant chez lui des moulins et chaussées, et de les vendre ensuite à un tiers, qui, lui aussi, a encore le droit de les exploiter

droit de les exploiter

2° Que, si ces chaussées ont causé, par leur trop grande élévation, des dommages au voisin, il doit les faire constater par des experts à être nommés par lui et le propriétaire de la chaussée, et, à défaut par l'un d'eux d'en nommer, par l'un des experts de la municipalité à être désigné par le préfet du comté, lesquels experts, en évaluant ces dom-

mages, et fixant une indemnité, penvent, s'il y a lieu, établir une compensation, en tout ou en partie, avec la plus-value qui peut résulter à l'immauble du voisin, par l'établissement de ces moulins.

3° Que, cela fait, et à défaut de paiement de ces dommages ainsi constatés et fixés, dans les six mois de la date du rapport des experts, avec l'intérêt légal, à compter de ladite date, le voisin a alors le droit de poursuivre pour le recouvrement du montant déjà fixé de ces dommages, avec intérêt, et pour faire démolir la chaussée, ou se faire autoriser à la démolir, aux frais et dépens du propriétaire.

4° Que le voisin n'a pas droit d'action contre le propriétaire, pour faire constater, s'il a ou non souffert des dommages, et s'il y en a, à combien ils se montent, attendu que l'acte sus-mentionné prescrit un mode différent de le faire, et il ne peut demander la démolition de la chaussée qu'en autant qu'il aura été constaté par des experts qu'il a droit à des dommages, que ces dommages auront été évalués, et qu'ils n'auront pas été payés, avec l'intérêt légal, dans les six mois de la date

du rapport des experts.

PER CURIAM: La demande principale est en dommages causés par la chaussée du défendeur, qui fait refluer les caux sur la terre du demandeur. Le défendeur appelle son vendeur comme garant formel; celui-ci prend son fait et cause, et plaide en droit et au fond. Par sa défense en droit, qui contient divers moyens, il plaide, entre autres choses, l'acte des Statuts R. B. C., chap. 51, comme faisant obstacle à l'action. Cet acte permet la construction et le maintien des moulins; il prescrit un mole particulier de constater si la chaussée cause des dommages, et à combien ils se montent, et il le fait en termes impératifs: "Sec 3. Ces dommages seront constatés à dire d'experts dont les parties intéressées conviendront en la manière ordinaire; et à défaut par l'une d'elles d'en nommer, l'un des experts de la municipalité, désigné par le préfet du comté, agira; en cas d'avis contraire, les deux experts nommés comme susdit en choisiront un troisième; ces experts prêteront serment devant un juge de paix de bien et dûment remplir leurs devoirs comme tels; en évaluant ces dommages et fixant l'indemnité, les experts, s'il y a lieu, pourront établir une compensation en tout ou en partie, avec la plus-value qui pourrait résulter aux propriétés du réclamant de l'établissement des dites usines, moulins, manufactures et machines." 19, 20 Vict., chap. 4, sec. 3. On sait ce que vaut une clause en termes impératifs: "Chaque fois que, par un acte quelconque, il est prescrit qu'une chose sera faite, l'obligation de l'accomplir sera sous-entendue; mais lorsqu'il est dit qu'une chose pourra être faite, le pouvoir de l'accomplir, sera facultatif." (Statuts R. B. C., chap. 1, sect. 13, § 3.) La version anglaise est plus succincte et plus explicite, s'il est possible, que la version française. Le demaudeur devait donc demander un expert, et requérir le défendeur d'en nommer un autre, et, sur son refus, s'adresser au préfet du comté pour faire désigner un des experts de la nmages ainsi des experts, ors le droit de de ces dom-, ou se faire

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dommages uer les caux lle son venait et cause, en droit, qui choses, l'acte obstacle à naintien des nstater si la se montent, s dommages s intéressées iut par l'une municipalité, vis contraire, noisiront un t un juge de comme tels; , les experts, n tout ou en x propriétés ies, moulins, , sec. 3. On fs: "Chaque nu'une chose tendue; mais e pouvoir de C., chap. 1, incte et plus . Le demanrir le défen-'adresser au xperts de la municipalité. Il a été dit que la municipalité n'en avait pas nommé. Les conseils municipaux sont autorisés à nommer tous les officiers nécessaires; tous les officiers qu'un statut quelconque veut qu'ils aient: "Chaque conseil pourra nommer tous autres officiers qui pourront être nécessaires pour mettre à effet les dispositions du présent acte, ou les ordres ou règlements passés par le conseil." (Statuts R. B. C., chap. 24, sect. 20, § 19.) Le chapitre 51 suffirait pour les autoriser à nommer des experts, s'ils n'en avaient pas, et on les forcerait par un bref de prérogative, le mandamus par exemple. Mais elles ont des experts, qu'elles nomment, en vertu de la sect. 22, § 5, de l'acte municipal sous le nom d'estimateurs; estimateurs et experts sont synonymes; les uns et les autres voient ce qu'il y a à estimer, et estiment; ils voient l'immeuble ou la chose cotisable du propriétaire, et l'estiment pour la faire taxer. Ils voient et estiment tout terrain pour y construire un hôtel de ville, pour des carrés, parcs ou places publiques, pour des chemins, ponts, ou pour le site d'un édifice nécessaire, ou pour tout autre ouvrage public, etc. Sect. 24, § 16, sect. 27, § 4, sect. 50, § § 1, 2, 3, 4, 5. Même pour les pertes de bâtisses ou autres propriétés, aux incendiés, sect. 24, § 18. Enfin, ils estiment, ils évaluent tout; et c'était un de ceux-là qu'il fallait prendre, si l'une des parties ne voulait pas nommer d'experts; car les estimateurs sont les experts nommés par la municipalité; la municipalité a la chose, (l'officier) exprimée par un autre mot qui signifie la chose même dont le demai deur pouvait avoir besoin. Le demandeur ne fait pas voir même que le défendeur a refusé de nommer un expert, il n'en dit pas un mot par sa déclaration; si le demandeur avait suivi les prescriptions du ch. 51, il aurait bien une action pour se faire payer, mais fondée sur un rapport d'experts, équivalant à une sentence arbitrale, et bien différente de l'action actuelle, qui exigerait une preuve qui doit se faire autrement, avec plus de promptitude et d'économie, et qui fait éviter les embarras et les difficultés d'un procès. Ainsi l'action n'est pas fondée en droit.

JUGEMENT: "La Cour, après avoir entendu le demandeur principa!, David Blais, fils, et le défendeur en garantie, Louis Napoléon Larochelle, sur la défense au fond en droit produite par le défendeur en garantie, à l'encontre de la demande principale. Attendu que le demandeur principal allègue, entr'autres choses, et en substance, par sa déclaration, qu'il souffre des dommages causés par une chaussée de plus de huit pieds de hauteur, construite par le défendeur en garantie, auteur du défendeur principal, sur la largeur d'une rivière qui traverse les immeubles voisins et contigus des parties en

cause principale, et qui sert à faire mouvoir trois moulins du défendeur principal, érigés sur son immeuble; cette chaussée qui est aussi érigée sur le même immeuble que les moulins, avant pour effet de faire élever et refluer les eaux de la rivière sur les terrains riverains, en haut d'icelle, et occasionnent par là des dommages aux propriétaires voisins. et surtout à lui, demandeur principal, savoir : cent piastres pour la valeur de plus de dix arpents de terre en superficie, couverts d'eau pendant toute l'année, et perdus pour lui; trente piastres, pour la perte, pendant trois années, des fruits et revenus qu'il n'a pu recueillir sur ces dix arrents de terre, n'avant pu les ensemencer ni en retirer aucun profit, et cent vingts piastres, pour valeur de la dépréciation de son immeuble, et des inconvénients qu'il éprouve, en conséquence de ce que les eaux qui le couvrent ainsi, nécessitent la construction d un pont très dispendieux, au lieu d'un bien moindre qui lui eût suffi, pour traverser la rivière, afin de con muniquer d'une partie à l'autre de son immeuble. D'où il conclut à une condamnation de deux cent cinquante piastres, pour tous ces dommages réunis, si mieux le défendeur principal n'aime démolir la chaussée, et ne payer, en ce cas, que trente piastres, pour perte des fruits et revenus, pendent trois ans, de dix arpents de terre; attendu que le défendeur principal a dénoncé cette demande au dit Louis Napoléon Larochelle, alléguant en substance par sa déclaration, que, par acte de vente, passé devant P. N. Pacaud, et son confrère, notaires, le dix de février 1866, Larochelle lui a vendu, avec promesse de garantir de tous troubles généralement quelconques, l'immeuble que le demandeur principal allègue lui appartenir, avec les moulins, leurs accessoires et dépendances quelconques dessus construits et mentionnés; et concluant à ce que Larcchelle intervienne sur cette demande principale, la fasse cesser, ou prenne son fait et cause, comme son garant formel, et le garantisse, indemnise et acquitte de toutes les condamnations généralement quelconques qui pourraient être prononcées contre lui, au profit du demandeur principal; attendu que Larochelle, défendeur en garantie, est intervenu en la présente cause, et, prenant le fait et cause du défendeur principal. et demandeur en garantie, Auger, comme son garant formel, par les défenses ci-après mentionnées, il conteste la demande principale, par trois plaidoyers en droit, et au mérite, et que, par sa défense au fond en droit, qui contient divers moyens, il soutient, entr'autres choses: 1° que, par la loi, tout propriétaire étant autorisé à exploiter tout cours d'eau qui traverse sa propriété, en y construisant des usines et moulins, ainsi que des écluses et chaussées pour les faire fonctionner, les dommages qui peuvent en résulter, par la trop grande élémoulins du tte chaussée les moulins. eaux de la d'icelle, et ires voisins, ent piastres n superficie, s pour lui; s, des fruits nts de terre, rofit, et cent son immeuuence de ce construction indre qui lui niquer d'une tà une conour tous ces cipal n'aime nte piastres, ans, de dix pal a dénonlle, alléguant vente, passé s, le dix de se de garanl'immeuble nir, avec les iques dessus e Larcchelle se cesser, ou ormel, et le idamnations prononcées attendu que en la préar principal, rant formel, la demande rite, et que, ers moyens, out propriéui traverse bulins, ainsi tionner, les grande élévation des écluses ou autrement, doivent être constatés par des experts à être nommés, et qui doivent agir et en faire rapport en la manière indiquée par la loi. 2º qu'une action, comme celle du demandeur principal, ne peut être intentée, pour dommages ou pour démolition d'une chaussée ou autres travaux, sans que des experts aient fait un rapport, et, à défaut de paiement des dommages constatés dans les six mois de la date du rapport, et qu'il ne paraît pas, par la déclaration du demandeur principal, que ce dernier se soit aucunement conformé aux dispositions de la loi, et qu'il y ait eu des experts de nommés pour constater son droit à réclamer des dommages ou une indemnité quelconque; attendu que le demandeur principal a répliqué généralement à cette défense au fond en droit; considérant: 1° que, par l'acte des S. R. B. C., ch. 51, le défendeur en garantie avait le droit d'utiliser la rivière traversant son immeuble et celui du demandeur principal, en y construisant, chez lui, les trois moulins et chaussées sus-mentionnés, et de les vendre ensuite, comme il l'a fait, au défendeur principal et demandeur en garantie, qui, lui aussi, avait et a encore le droit de les exploiter; 2° que, si cette chaussée a causé, par sa trop grande élévation, des dommages au demandeur principal, et, nommément, ceux dont il se plaint, il devait les faire constater par des experts à être nommés par lui et le défendeur principal et demandeur en garantie, et. à défaut par l'un d'eux d'en nommer, par l'un des experts de la municipalité, à être désigne par le préfet du comté, lesquels experts, en évaluant ces dommages, et fixant une indemnité, auraient pu, s'il y avait lieu, établir une compensation, en tout ou en partie, avec la plus-value qui pouvait résulter à l'immeuble du demandeur, de l'établissement de ces moulins; 3° que, cela fait, et à défaut de paiement de ces dommages ainsi constatés et fixés, dans les six mois de la date du rapport des experts, avec l'intérêt légal à compter de la dite date, le demandeur principal aurait eu alors le droit de poursuivre pour le montant déjà fixé de ces dommages, avec intérêt, et pour faire démolir la chaussée, ou se faire autoriser à la démolir, aux frais et dépens du défendeur principal et demandeur en garantio; 4° qu'il résulte de ce que dessus que le demandeur principal n'a pas droit d'action contre le défendeur principal et demandeur en garantie, pour faire constater s'il a ou non souffert des dommages, et, s'il y en a, à combien ils se montent, attendu que l'acte sanctionné, prescrit un mode différent de le faire, lequel mode est plus prompt et plus économique, et a, en outre, l'effet de soustraire le défendeur principal et demandeur en garantie aux embarras et aux difficultés d'un procès, et qu'il ne peut demander la démolition de la chaussée qu'en autant qu'il aura été constaté par experts qu'il a droit à des dommages, que ces dommages auront été évalués, et qu'ils n'auront pas été payés, avec l'intérêt légal, dans les six mois de la date du rapport des mêmes experts, qu'ainsi l'action du demandeur principal n'est pas fondée en droit. Par ces motifs, déboute le demandeur principal, Blais, de son action principale et le condamne aux dépens d'icelle, ainsi qu'à ceux de la demande en garantie, envers le défendeur principal et demandeur en garantie, Auger, et le défendeur en garantie, Larochelle, chacun en droit, tant en demandant, défendant, que d'a la sommation et dénonciation (1) (3 R. L., p. 272; 14 R. L., p. 369.)

LAURIER et CRÉPEAU, avocats du demandeur.

E. L. PACAUD, avocat du défendeur et du demandeur en garantie.

MONTAMBAULT et TASCHEREAU, avocats du défendeur en garantie.

(1) Le ch. 104 des S. C. de 1856, 19-20 Vict., intitulé: "Acte pour autoriser l'exploitation des cours d'eau," décrétait, sec. 1, que "tout propriétaire est autorisé à utiliser et exploiter tout cours d'eau qui borde, longe ou traverse sa propriété, en y construisant et établissant des usines, moulins, manufactures et machines de toute espèce, et pour cette fin y faire et pratiquer toutes les opérations nécessaires à son fonctionnement, tels que écluses, canaux, murs, chaussées, digues, et autres travaux semblables." La sec. 2 du même chapitre se lisait ainsi qu'il suit: "Les propriétaires ou fermiers des dits établissements resteront garants de tous dommages qui pourront en résulter et être causés à autrui, soit par la trop grande élévation des écluses ou autrement." La sec. 3 ordonnait que "ces dommages seront constatés à dire d'experts dont les parties intéressées conviendront en la manière ordi-naire." La sec. 4 se lisait ainsi qu'il suit: "A défaut du paiement des dommages et indemnités etc., celui y obligé sera tenu de démolir les travaux qu'il pourra avoir faits, ou iceux le seront à ses frais et dépens, sur jugement a cet effet, le tout sans préjudice aux dommages intérêts encourus jus-qu'alors." Dans une action portée par un seigneur, ce dernier alléguant son titre et son droit de banalité, concession à l'un des défendeurs d'une terre dans sa seigneurie, avec clause, dans le contrat, qu'aucun moulin ne serait érigé; que les défendeurs, associés, avaient construit un moulin à scie sur une rivière non navigable avoisinant le terrain concédé, et avaient érigé sur ladite rivière une chaussée qui faisait refluer les eaux sur le moulin à scie et le moulin à farine du demandeur en opération pendant plus de trente ans, empêchait le fonctionnement des dits moulins et causait de grands dommages; et concluant à ce qu'il fût déclaré que les défendeurs n'avaient aucun droit d'ériger un moulin à scie ou aucun autre moulin; que leur chaussée fût démolie et les défendeurs condamnés en dommages; il a été jugé qu'aux termes des sections ci-dessus le demandeur n'avait aucun droit à l'usage exclusif des eaux ; qu'il ne pouvait, par les conclusions de son action, demander la démolition des ouvrages dont il se plaignait ; que les défendeurs étaient autorisés à utiliser et exploiter le cours d'eau qui borde leurs propriétés à cet endroit et à y construire ladite chaussée, mais qu'en utilisant et exploitant le cours d'eau ils sont néanmoins responsables de tous dommages qui pourraient en résulter à autrui, soit par la trop grande élévation de la chaussée, ou autrement; qu'une expertise doit être ordonnée, avant faire droit, afin de constater si la chaussée et les autres ouvrages des défendeurs causaient des dommages au demandeur et à en faire l'estimation, s'il y avait lieu. (Panyman vs Bricault dit Lamarche et al., C. S., Montréal, 31 octobre 1860, SMITH, J., 11 D. T. B. C., p. 76, et 9 R. J. R. Q., p. 393.) es dommages
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Acte pour autotout propriétaire de, longe ou trausines, moulins, ny faire et pratitels que écluses, 88." La sec. 2 du s ou fermiers des qui pourront en vation des écluses eront constatés à la manière ordidu paiement des molir les travaux ns, sur jugement ts encourus jushier alléguant son leurs d'une terre moulin ne serait lin à scie sur une t érigé sur ladite ulin à scie et le s de trente ans, de grands domn'avaient aucun leur chaussée fût été jugé qu'aux droit à l'usage n action, demanéfendeurs étaient propriétés à cet t et exploitant le es qui pourraient la chaussée, ou re droit, afin de rs causaient des ait lieu. (Pang-31 octobre 1860,

PRIVILEGE DU VENDEUR.

Cour du Banc de la Reine, en appel, Montréal, 6 septembre 1872.

Coram Duval, J. en C., Caron, J., Drummond, J., Badgley, J., Monk, J.

JAMES BROWN & ANTOINE LEMIEUX.

Jugé:—Que le vendeur non-payé, qui n'a pas vendu sans jour et sans terme, n'a que l'action en résolution, et non l'action en revendication comme en droit romain: encore qu'il se soit réservé son droit de propriété jusqu'à parfait paiement, et le droit de reprendre sa chose, en cas de non-paiement, même sans procédés judiciaires. (1)

L'appelant, demandeur en Cour Supérieure, par acte passé à Montréal, devant Simard, notaire, le 24 décembre 1867, loua à l'intimé, pour le terme de deux années, deux chevaux et un certain nombre de voitures, ainsi que des harnais et autres effets. Ce bail fut fait pour le prix et somme de \$800, payable à des échéances déterminées au dit acte. Il fut expressément convenu que l'appelant aurait le droit de reprendre les objets loués, en tout temps pendant la durée du bail, et que, dans le cas où l'intimé ne ferait pas fidèlement ses paiements, il pourrait, sans qu'il fût besoin de procédés judiciaires, se mettre en possession de ces objets; et, alors, les argents que l'intimé se trouverait avoir payés appartiendraient à l'appelant, comme représentant la valeur de l'usage et occupation des objets loués. Il fut, en outre convenu que l'intimé resterait propriétaire des objets loués, si, à l'expiration du bail en question il en avait accompli toutes les conditions. Le 8 mai 1869, il était dû à l'appelant, en vertu de ce bail, une somme de \$250. L'intimé ayant refusé de payer cette somme, il fut mis en demeure de remettre à l'appelant les objets loués, conformément à la convention intervenue entre eux, et, sur son refus de le faire, ce dernier fit émaner une saisie-revendication. L'intimé plaida que ce n'était pas un bail, mais une vente que lui avait consentie l'appelant, des objets revendiqués, et que cette vente ayant été faite avec termes, il était sans droit à les revendiquer; que son défaut de payer le prix de vente ne pouvait donner ouverture qu'à une action en recouvrement des paiements échus, et non à une saisie-revendication. Les parties sont d'accord sur les faits. L'acte intervenu entre elles, quoique participant de la nature d'un bail, est en effet une vente, au

⁽¹⁾ Troplong, Priv. et Hyp., n° 224 (bis). Dalloz, Dict., v° Vente, vol. 12, p. 899, no 4.

moyen de laquelle l'intimé serait resté propriétaire des objets loués, s'il avait fait ses paiements tels que convenus. Cette stipulation n'est pas exprimée à l'acte, mais telle était l'intention des parties, et l'admission en a été faite à l'enquête. Il n'y a donc pas de difficultés sur les faits; toute la question est de savoir si l'appelant, sous les circonstances toutes partilières de la cause, et de la transaction intervenue entre l'intimé et lui, avait le droit de reprendre, par voie de saisie-revendication, les objets qu'il avait loués à ce dernier. La Cour Supérieure a jugé qu'il n'avait point ce droit, et a renvoyé la saisie-revendication avec dépens. Ce jugement a été rendu le 30 novembre 1869, et est comme suit: Coram Berthelot, J. "La Cour Considérant qu'il est admis, par le demandeur, qu'en vertu de l'acte ou contrat de louage du 24 décembre 1867, sur lequel est fondée son action le défendeur pouvait et devenait propriétaire des objets et effets mentionnés au bail, à l'expiration d'icelui, et que telle était la convention intervenue entre les parties lors de la passation du bail, et que, par conséquent, le demandeur ne pouvait se pourvoir, par une demande en saisie-revendication, ainsi qu'il l'a fait, a renvoyé l'action du demandeur, avec dépens." C'est de ce jugement dont est appel, et l'appelant soumit qu'il est erroné, pour entr'autres raisons, les suivantes: 1° Parce que l'intimé devait, à l'époque de l'émanation de la saisie-revendication, une somme de \$250, et que la cour ne devait pas renvoyer l'action de l'appelant en entier. 2º Parce que, d'après la convention intervenue entre les parties, l'appelant avait le droit de saisir et revendiquer les objets livrés à l'intimé, nonobstant les délais qu'avait obtenus ce dernier pour en payer la valeur. L'intimé prétendait que, pour qu'il y ait lieu à la revendication, il faut que le défendeur détienne les objets revendiqués sans titre, sans droit, et contre le gré et la volonté du demandeur. Or, comment, dans la cause actuelle, pourrait-on prétendre que l'intimé gardait sans titre la possession des effets loués? Et comment sans droit? N'avait-il pas un titre à cette possession, et des droits en résultant? Ce titre pouvait peutêtre être résilié; mais jusque-là il subsistait avec toutes ses conséquences. Le demandeur devait donc, avant de prendre une saisie-revendication, faire résiller le bail qu'il avait consenti au défendeur. Jusque-là le défendeur les possédait en vertu d'un titre résoluble il est vrai, mais qui lui donnait des droits tant qu'il n'était pas annulé. Dans l'espèce actuelle, ce que l'appelant voulait faire, c'était vendre, et l'intimé acheter les effets en question; seulement, comme l'intimé était incapable d'en payer le prix comptant, l'appelant a voulu garder un lien et un privilège sur ses effets, en s'en réservant la propriété jusqu'à parfait paiement. La question se pose donc d'une ma-

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nus. Cette tait l'intenenquête. Il la question outes partientre l'inle saisie-rer. La Cour renvoyé la été rendu le RTHELOT, J., demandeur, 24 décembre r pouvait et més au bail, ntion interbail, et que, ourvoir, par a fait, a rende ce jugeil est erroné, que l'intimé evendication, pas renvoyer après la convait le droit , nonobstant er la valeur. a revendicarevendiqués é du demanrrait-on préon des effets titre à cette ouvait peutc toutes ses prendre une consenti au n vertu d'un s droits tant que l'appeter les effets capable d'en rder un lien la propriété c d'une ma-

des objets

nière directe; le vendeur non payé, qui s'est réservé la propriété des effets vendus jusqu'à parfait paiement, a-t-il l'action en revendication? "Si le vendeur, dit Troplong, n'avait pas accordé de terme, s'il n'avait livré la chose qu'à titre précaire, à titre de bail, par exemple, alors il pouvait garder la chose jure pignoris, ou la reprendre comme lui appartenant encore." Trop., Priv. et Hyp., no 184. "Par le droit romain", dit Pothier, " le pacte commissoire était censé avoir opéré de plein droit la résolution du contrat de vente; mais selon notre jurisprudence, le pacte commissoire n'opère pas de plein droit la résolution du contrat par défaut de paiement dans le temps limité; il donne seulement au vendeur, en ce cas, une action pour demander la résolution du contrat." Pothier, Vente, n° 459. "En droit français," dit Troplong, "on tenait pour constant que le vendeur non payé ne pouvait reprendre sa chose, encore que dans le contrat, il y eût clause expresse de réserve du domaine, ou bien que l'acheteur ne fût détenteur qu'à titre précaire jusqu'à parfait paiement, cette clause n'étant considérée que comme équivalant à une constitution d'hypothèque spéciale et privilégiée." Troplong, Vente, nºs 621, 622, 624. "Le vendeur, dit d'Espeisses, par défaut de paiement du prix, ne peut pas retirer la chose vendue des mains de l'acheteur, bien que, dans le contrat, il y ait la clause par laquelle l'acheteur déclare tenir la chose en précaire du vendeur, jusqu'à ce que le prix lui soit entièrement payé; car aujourd'hui, cette clause n'empêche pas la translation de la propriété, et n'opère autre chose qu'une hypothèque spéciale et privilégiée." D'Espeisses, t. 1, p. 87, n° 19. La question soulevée en cette cause est savamment discutée et résolue dans le sens de l'intimé, par Troplong, Priv. et Hyp., n° 224 (bis); Dalloz, Dict., vo. Vente, vol. 12, p. 899, n° 4.

PER CURIAM: L'appelant avait vendu une voiture et autres effets à l'intimé, en vertu d'un contrat qui est qualifié de bail jusqu'au paiement du prix. L'intimé ne payant pas, l'appelant eut recours à une saisie-revendication, demandant l'alternative d'une condamnation pour la somme due. L'intimé plaida qu'étant propriétaire la revendication ne pouvait avoir lieu, et il demanda le débouté de l'action. De fait, l'action fut déboutée en première instance, et la Cour d'Appel est d'opinion que le jugement est exact dans la partie qui annule la saisie, mais qu'il ne l'est pas dans le débouté de l'action. L'appelant aurait dû avoir jugement pour la balance du prix de vente. En conséquence, le jugement est renversé et l'intimé est condamné à payer \$200, avec dépens, tant en cour inférieure qu'en appel, excepté les frais de saisie, qui restent à la charge de l'appelant. Ce jugement en appel est motivé comme suit;

"La cour considérant que, quant à cette partie du jugement dont est appel, dans laquelle il est déclaré que le demandeur-appelant ne pourrait se pourvoir par une demande en saisie-revendication, ainsi qu'il l'a fait, il n'y a point d'erreur, mais, considérant aussi que le demandeur, non-seulement demandait, par son action, une revendication des biens-meubles saisis, mais concluait aussi, comme alternative, qu'au cas où son droit de revendication ne serait pas reconnu par la cour le défendeur intimé fût condamné à lui payer ce qu'il devait, en vertu de l'acte qui fait la base de l'action (lequel acte est de fait un acte de vente, quoique désigné sous le nom de bail), et considérant que, lors de l'institution de l'action, le défendeur devait au demandeur la somme de \$200, en vertu du dit acte. Considérant, partant, que, dans cette partie du jugement qui renvoie l'action du demandeur en sa totalité, il y a erreur, cette cour infirme cette dernière partie du jugement. L'honorable juge en chef DUVAL et l'honorable juge MONK diffèrent." (1) (3 R. L., p. 361; 1 R. C., 476).

LORANGER & LORANGER, avocats de l'appelant. DUHAMEL & RAINVILLE, avocats de l'intimé.

VENTE.—INSAISISSABILITE.

COUR SUPÉRIEURE, Montréal, 30 décembre 1870.

Coram BEAUDRY, J.

ARMSTRONG vs DUFRESNAY et al.

Jugé:—10 Qu'avant la promulgation du Code Civil, art. 1472, le vendeur n'était pas tenu de transférer la propriété.

20 Que le légataire peut disposer des choses qui lui ont été léguées à titre d'aliments à la condition de ne pouvoir être saisies, sans cependant qu'il y ait défense de les aliéner.

BEAUDRY, J.: Par son testament, du 22 février 1829, Jacques Deligny lègue à Françoise Langevin, sa femme, l'usufruit de tous ses biens, pour en jouir sa vie durant, et, avenant son décès, ou convol en secondes noces, les enfants devant lui succéder dans l'usufruit et jouissance viagère de tous ses biens, par parts et portions égales entre eux, le testateur substituant la propriété de tous les immeubles à tous ses petits-enfants, nés et à naître, pour en faire et disposer comme bon leur semblerait, et se les partager par parts et portions égales entre

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⁽¹⁾ Thifaut et Racine, jugement 4 mars 1870, en appel, à Montréal, C. C. n° 7759; Boulanger vs Archambault, jugement à Montréal, 12 mai 1868.

tie du jugee le demanlemande en int d'erreur, ulement deens-meubles u'au cas où par la cour qu'il devait, uel acte est om de bail), a, le défenvertu du dit lu jugement l y a erreur, ent. L'hono-K diffèrent."

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souches. Par codicille, le testateur veut que les petits-enfants se partagent la propriété ou l'usufruit de ses biens, suivant que le cas écherra, non par souches, mais par parts et portions égales entre eux tous, et, si quelqu'un des petits-enfants, légataires en propriété, venait à décéder en minorité, sans laisser d'hoirs légitimes et avant partage au mobilier, sa part retombait dans la masse. Aucun des petits-enfants ne pouvait avoir la propriété de la portion à lui afférente que six mois après le décès du dernier vivant des enfants, sans pouvoir provoquer un partage pendant ce temps. Legs de l'usufruit fait aux dits enfants à titre d'aliments, sans pouvoir être saisi ni arrêté par leurs créanciers. Par son testament du 8 septembre 1838, Mme Deligny, alors veuve, légua l'usufruit et jouissance de tous ses biens immeubles à tous ses enfants nés de son mariage, et aux enfants qui pourraient être décédés, les revenus devant être divisés par souche; la part dont chaque enfant aura joui, retournera à ses enfants, mais sera confondue avec celle de tous les petits-enfants, qui continueront tous ensemble à partager également les revenus des dits biens jusqu'à l'époque ci-après mentionnée. Elle donna la propriété de tous ses meubles à tous ses petits-enfants, nés et à naître, pour, par eux, en disposer en toute propriété, et se les partager par parts et portions égales entre tous; mais aucun d'eux n'aura la propriété de la part et portion à lui afférente que six mois après le décès des enfants de la testatrice, sans pouvoir provoquer partage. Insaisissabilité comme ci-dessus. Permission de changer le placement de la part de chacun des enfants, sur avis de parents, pour suivre même destination que la part originaire. Enfin, volonté que le partage des biens du mari se fasse de la même manière, pour éviter tout trouble, à peine de déchéance du legs par elle fait. Enfants :-1. Lydie Léocadie Deligny, mariée au demandeur, a eu quatre enfants. 2. Louise Henriette Deligny, mariée à Hercule Olivier, a eu deux enfants, et est décédée le 12 mars 1833. 3. Sophie Deligny, mariée à Charles A. Forneret, décédée sans enfants, avant sa mère. 4. Antoinette Deligny, morte avant ses père et mère. 5. Louis Olivier Deligny, prêtre. 6. Luce Deligny, mariée à P. X. Boucher, décédée 21 janvier 1832 laissant un enfant. 7. Simon Deligny, mort sans hoirs, en 1837. Le demandeur, et son épouse ont acquis l'usufrait de messire Deligny, prêtre, et représentent ainsi tout l'usufruit. Le demandeur a acquis les iroits de Louis Simon Olivier et de Marie-Anne Charlotte Olivier, les deux enfants de Louise Henriette Deligny, qui avait part dans l'usufruit, et d'Olivier Boucher, seul enfant de Luce Deligny, et qui avait part dans l'usufruit. Les seuls petits-enfants restant des testateurs, sont les enfants du demandeur, par qui il s'est obligé de faire ratifier la vente consentie à Louis Boucher. Le demandeur et son épouse ont vendu à Louis Boucher certains terrains dépendant de la succession Deligny, comme leur appartenant, partie comme usufruitiers des époux Deligny, partie comme étant aux droits de Louis O. Deligny, et partie en propriété, comme étant aux droits de M. A. C. Olivier et Louis Simon Olivier, et enfin comme étant aux droits de F. Olivier Boucher. avec obligation de faire ratifier l'acte par Louis J.E. Armstrong. leur fils, à demande, et par Henriette, Amélie et Charlotte, leurs filles, à leur âge de majorité. L. J. E. Armstrong a ratifié. Hypothèque pour sûreté de la ratification. La présente action est portée pour la balance du prix. Les demandeurs plaident: 1° Nullité de la vente, en autant que les vendeurs n'étaient pas propriétaires, et ne peuvent transmettre la propriété, à cause de l'existence du grand nombre d'enfants, petits-enfants et arrière-petits-enfants existant encore. La déclaration de leurs titres ne peut les mettre à couvert; qu'ils ont omis et caché leurs véritables titres; que le cautionnement et l'hypothèque pour la ratification du dit acte sont insuffisants, l'immeuble hypothéqué n'étant pas davantage la propriété des demandeurs. Cette exception se termine en demandant la nullité, et conclusion au paiement de ce qu'il avait déjà payé. Exception appuyée sur les mêmes faits, et concluant à ce qu'on leur donne caution qu'ils ne seront pas troublés. Les questions soulevées sont les suivantes: 1° Les enfants et les petits-enfants des époux Deligny pouvaient-ils disposer de leurs droits, ainsi qu'ils l'ont fait, c'est-à-dire, les appelés pouvaient-ils vendre leurs droits de propriété, avant l'ouverture de la substitution? Ce point n'est pas contesté. 2° Les enfants et les petits-enfants pouvaient-ils disposer d'un usufruit qui leur a été légué comme aliments non susceptibles de saisiearrêt? 3° Les défendeurs sont-ils exposés à quelque trouble? Y a-t-il quelqu'autre partie qui puisse plus tard venir réclamer partie des lots vendus à Louis Boucher? 4° Les demandeurs étaient-ils tenus de transférer la propriété, et l'acte de vente est-il nul ? 5° Y a-t-il lieu d'ordonner un nouveau cautionnement? Il est à observer qu'il n'y a aucune preuve que l'immeuble hypothéqué par suite du cautionnement vient de la succession Deligny. Sur le premier point, je ne vois pas que la substitution puisse s'étendre au délà des petits-enfants des testateurs. En vertu des testaments, les enfants ont l'usufruit, leur vie durant, usufruit qui passe à leurs enfants, tant qu'il reste quelqu'un des frères et sœurs enfants des testateurs, et, après les décès de tous ceux-ci, l'usufruit devient consolidé au fonds, dans la personne des petits-enfants, pour être partagé entre eux par parts égales. Des sept enfants des testateurs, trois sont décédés sans postérité; un est dans les ordres sacrés,

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deux ont laissé des enfants qui avaient droit à l'usufruit de la part de leur mère. Et ces enfants ont vendu au demandeur tant leur usufruit que leurs droits à venir dans le fonds. Les défendeurs ne contestent pas le droit de faire cette vente; le septième enfant des testateurs est l'épouse du demandeur qui a des enfants vivants. Nonobstant l'emploi de termes d'usufruit, il y a évidemment ici une substitution, car, comme il faut que la propriété appartienne à quelqu'un, et que, lors du décès des testateurs, presque tous les enfants n'avaient pas encore d'enfants, ils se trouvèrent chargés de remettre les biens à leurs enfants à naître, et par là même, étaient grevés de substitution. Cependant, on ne voit pas que les testaments créant ces substitutions aient été enregistrés, formalité sans laquelle les défendeurs ne pourraient être troublés. Il y aurait encore moins de risque de trouble, si l'on prétend que les testaments ne contiennent pas substitution, puisqu'alors les enfants sont propriétaires de la nue propriété. La disposition par laquelle les testateurs déclarent que les petits-enfants n'auront la propriété que six mois après le décès du dernier des enfants ne peut, suivant moi, avoir l'effet de créer un autre degré de substitution. Elle veut dire seulement que le partage ne pourra être provoqué entre les petits-enfants qu'à cette époque. Si cette interprétation n'est pas admise, alors il faut dire qu'il n'y aura que les petits-enfants vivant à l'époque de l'expiration des six mois, qui pourront avoir part dans les biens substitués, les arrière-petits-enfants n'étant pas appelés. La deuxième question si les légataires peuvent disposer des choses qui leur ont été léguées à titre d'aliments à la condition de ne pouvoir être saisis, sans cependant qu'il y ait défense de les aliéner, a été déjà décidée dans l'affirmative, et il suffit de renvoyer sur ce point aux développements donnés par Troplong, en son traité de la vente, nº 227, pp. 309 à 311. (1) En 3e lieu, on a soulevé la question si les vendeurs étaient tenus de transférer la propriété? Question qui, avant le Code Civil, ne souffrait aucune difficulté; elle a été jugée assez souvent, sans qu'il soit nécessaire de la discuter ici. L'opinion de Pothier a toujours été suivie jusqu'au Code qui a établi une règle contraire comme droit nouveau. Enfin, le dernier point soulevé est de savoir s'il y a lieu à ordonner un nouveau cautionnement. Je ne le pense pas. Les parties ont stipulé à cet égard le cautionnement à donner, et l'acheteur a été satis-

⁽¹⁾ Rolland de Villargues, Dict. de Droit, vo. Alimens: "Peut-on céder le droit à des aliments?" n° 121. Nous n'entendons parler ici que des aliments qui son dus à raison des liens de parenté et d'alliance: or, réduite à ces termes notre question doit être décidée pour la négative. No 125. Quant aux aliments conventionnels ou dus en vertu de testament, nous verrons ailleurs que les mêmes motifs ne s'élèvent plus contre la cession qu'on voudrait en faire.

fait de celui qui est mentionné dans l'acte, et la Cour persuadée qu'il n'y a pas d'autre risque de trouble que ceux prouvés, ne peut ordonner de cautionnement supplémentaire.

Le jugement de la Cour est comme suit: "La Cour. considérant qu'en vertu de l'acte de vente consenti le 11 octobre 1856 à Louis Boucher, par le demandeur et son épouse, les vendeurs n'étaient pas, par la loi alors en force, tenus de transférer la propriété du dit immeuble, mais seulement la jouissance, sauf la garantie au cas de trouble; considérant que les vendeurs avaient acquis dans l'immeuble en question tous les droits de ceux qui étaient appelés par les testaments et codicilles de feu Jacques Deligny et son épouse, Françoise Langevin, à recueillir tant la jouissance que la propriété des immeubles délaissés par ces deux derniers, sauf ceux de trois des enfants du demandeur comme mineurs, et pour sûreté desquels, cautionnement a été fourni par le demandeur : et. considérant que les légataires des dits Jacques Deligny et son épouse, représentés par le demandeur et son épouse, pouvaient céder leurs droits ainsi qu'ils l'ont fait; considérant que les défendeurs sont ainsi mal fondés dans leurs exceptions; condamne les défendeurs, ès-qualités, à payer au demandeur la somme de £1409, 14, 7, balance en principal restant due, sur le prix stipulé dans un acte de vente reçu le 11 octobre 1856, devant J.-Bte Chalut et confrère, notaires, à Berthier, et consenti par le demandeur et son épouse, au dit Louis Boucher, avec intérêt depuis le 10 juillet 1869, sur celle de £1,169 14s. 7d. au taux de six par cent, et sur celle de £240, au taux de huit par cent, suivant l'acte entre le demandeur et Louis Boucher, recu le 12 mars 1862 devant J.-B Chalut et confrère. notaires, jusqu'à parfait paiement, et les dépens." (3 R. L., p. 366).

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LAFRENAYE & ARMSTRONG, avocats du demandeur. HON. A. A. DORION, C. R., conseil. MOUSSEAU & DAVID, avocats des défendeurs. LS BELANGER, conseil pour les défendeurs Cour persuaceux prouvés,

ire. a Cour, consile 11 octobre on épouse, les rce, tenus de seulement la nsidérant que question tous testaments et rancoise Lanpriété des imux de trois des ur sûreté desdeur; et, con-Deligny et son use, pouvaient lérant que les ceptions; condemandeur la estant due, sur ctobre 1856, erthier, et con-Louis Boucher. de £1,169 14s. 0, au taux de et Louis Bouut et confrère, ens." (3 R. L.,

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CORPORATIONS MUNICIPALES.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 2 mars 1871.

Coram Duval, J. en C., Drummond, J., Badgley, J., et Monk, J.

LA CORPORATION DE LA PAROISSE DE SAINT-ANDRÉ et LA COR-PORATION DU COMTÉ D'ARGENTEUIL.

Jugé: Qu'un corps municipal ne peut pas en loi réclamer le coût d'ouvrages et de travaux, à moins qu'il ne l'ait préalablement payé à l'entrepreneur.

2º Que le coût d'un ouvrage de comté est à la charge des contri-

buables, et non pas des municipalités locales.

3° Que la collection d'une telle créance doit se faire par le prélèvement de la quote-part de chaque intéressé, par le secrétaire-trésorier de chaque municipalité locale, suivant le chap. 24, sec. 59 de l'acte.

Le jugement porté en appel fut rendu par la Cour Supérieure, siégeant à Sainte-Scholastique, le 15 octobre 1868, condamnant l'appelante à payer à l'intimée la somme de \$2,642.08, étant la part et portion que ladite intimée est tenue de payer, pour sa quote-part et proportion des frais de construction, et aux frais incidents et accessoires, d'un pont sur la rivière du Nord, au village de Saint-André, avec intérêt sur ladite somme, à compter de la date de l'action; que, le 29 décembre 1864, sur requête d'un certain nombre de personnes du comté d'Argenteuil, demandant la construction d'un pont sur la rivière du Nord, au village de Saint-André, le conseil municipal du comté d'Argenteuil aurait nommé John Harrington surintendant spécial, pour faire un rapport sur la requête. Plus tard, après avis et convocation d'assemblée des personnes intéressées dans le pont, Harrington fit son rapport, et ordonna que le pont serait reconstruit en bois, à l'endroit susdit, dans le village Saint-André; que les ouvrages seraient soumis à une compétition publique, pour une somme déterminée, et que le coût de ces ouvrages, et ceux qui deviendraient nécessaires par la suite, pour l'entretien du pont qui serait à la charge des propriétaires et occupants de terres dans la seigneurie d'Argenteuil, dans les comtés d'Argenteuil et des Deux-Montagnes, suivant le procès-verbal de Paul Lacroix décrit au long dans le rapport; que, le 2 février 1865, à une assemblée des délégués des comtés d'Argenteuil et des Deux-Montagnes, le rapport fut homologué, et ordre fut donné au dit Harrington de recevoir des soumissions pour la construction du pont, après avoir fait annoncer pour telles

soumissions; ce qui fut fait; que plusieurs soumissions auraient été faites, parmi lesquelles se trouvait celle de Mathew Moody, de la ville de Terrebonne, laquelle aurait été acceptée par Lemuel Cushing, spécialement autorisé à cet effet par le conseil municipal du comté d'Argenteuil; que le contrat aurait en conséquence été donné au dit Mathew Moody, pour la somme de £687 10s, payable par installements, sans intérêt jusqu'à l'échéance des paiements, mais avec intérêt après leur échéance respective; que le pont aurait été construit par Moody, et accepté par Harrington, surintendant spécial du pont, laquelle acceptation aurait été approuvée par le conseil de la municipalité du comté d'Argenteuil; que ledit ouvrage était un ouvrage de comté, et que la défenderesse était une municipalité locale comprise dans les limites du comté; que, le 16 juillet, il aurait été résolu par le conseil municipal du comté d'Argenteuil qu'une taxe serait prélevée sur le propriétés obligées, d'après le procès-verbal, à l'érecont, savoir: sur les propriétés de la seigneurie d'Argeneralli, lans les comtés d'Argenteuil et des Deux-Montagnes, pour pouvoir rencontrer et payer les jugements obtenus par goody contre la municipalité du comté d'Argenteuil, et les frais e, inter is accrus sur iceux; que, le 22 septembre, par une résolution du conseil municipal du comté d'Argenteuil, le secrétaire du conseil aurait été autorisé à se procurer tous les comptes de ceux qui avaient travaillé à la construction du pont, et qui n'avaient pas encore été payés; ce qui aurait été fait; que le montant qui était alors dû, d'après ces comptes, pour la construction du pont, déduction faite des produits de la vente du bois du vieux pont Saint-André, et l'allocation du gouvernement, s'élevait à la somme de \$2,775.07; que, le 6 décembre 1865, le conseil municipal du comté d'Argenteuil aurait passé un règlement fixant la somme qu'aurait à payer chaque municipalité obligée à l'érection du pont, et qu'il aurait été déclaré et résolu que l'appelante aurait à payer, pour sa quote-part dans le prix de la confection du pont, la somme de \$2642.08; que le règlement aurait été publié dans les différentes municipalités locales intéressées, et, en conséquence, les conseils locaux des municipalités locales mentionnées dans ledit règlement furent dûment notifiés du montant qu'ils auraient à payer, et copie de tels avis fut déposée au bureau du conseil municipal de chaque municipalité locale, puis l'intimée conclut au paiement par l'appelante de la somme de \$2,642.08. A l'encontre de cette action, l'appelante produisit une défense en droit alléguant: 1° Qu'il n'y avait aucun lien de droit entre l'intimée et l'appelante, concernant la créance indiquée dans la déclaration; 2° qu'il n'était pas allégué que l'intimée avait fait le pont dont il est question, mais que ce pont avait

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s soumissions ivait celle de ielle aurait été autorisé à cet enteuil; que le dit Mathew e par installeaiements, mais e le pont aurait gton, surintenit été approud'Argenteuil; que la défenlans les limites ı par le **c**onseil serait prélevée zerbal, à l'éreceigneurie d'Arux-Montagnes, ts obtenus par genteuil, et les septembre, par l'Argenteuil, le cocurer tous les uction du pont, aurait été fait ; omptes, pour la rits de la vente ion du gouverle 6 décembre ail aurait passé payer chaque u'il aurait été ayer, pour sa t, la somme de dans les difféonséquence, les tionnées dans tant qu'ils auau bureau du , puis l'intimée e de \$2,642.08. it une défense lien de droit ance indiquée que l'intimée ce pont avait été fait par Moody pour l'intimée, ainsi qu'allégué dans la déclaration; 3° que, par son action, l'intimée excipait du droit d'autrui; 4° qu'il n'était pas allégué que l'intimée est subrogée aux droits de Moody; 5° qu'il n'était pas allégué que l'intimée eut payé Moody; 6° qu'aux termes de l'acte municipal, l'intimée n'avait aucun droit d'action contre l'appelante, car toutes répartitions imposées par un conseil de comté, pour pourvoir à certains travaux de comté sont transmises, par le secrétaire-trésorier du comté, au secrétaire-trésorier de chaque municipalité locale intéressée dans tels travaux, et ce dernier officier, après avoir perçu les montants des intéressés, suivant la loi, par avis, et saisie à défaut de paiement, en rend compte à la municipalité de comté; 7° que la somme réclamée par l'intimée n'était pas une dette à elle due par l'appelante ni par aucun des intéressés; 8° qu'il n'était pas démontré que les ouvrages en question étaient des ouvrages de comté; 9° que toute action que pouvait avoir l'intimée était contre le secrétaire-trésorier local, en reddition de compte, ou en recouvrement de l'amende, pour inexécution de devoir; 10° que les conclusions de la déclaration de l'intimée ne découlaient pas des prémisses. Par une première exception péremptoire l'appelante allègue ensuite: que le pont a été verbalisé par Paul Lacroix en 1807, en sa qualité de grand-voyer, et que, par ce procès-verbal, les intéressés seuls peuvent être poursuivis, et non la municipalité; que dans le rapport de Harrington il est ordonné que les ouvrages seraient faits par les propriétaires et occupants de terres dans la seigneurie d'Argenteuil et des Deux-Montagnes, et que ces propriétaires ou occupants de terres ne sont nommés ni dans le rapport, ni dans la déclaration; qu'à l'époque du procès-verbal de Lacroix le coınté d'Argenteuil n'existait pas, et que ce procèsverbal seul doit déterminer si c'est un ouvrage de comté, et comme tel sous la juridiction de l'intimée; que ce procèsverbal aurait été amendé en 1856, par les commissaires des chemins, qu'il aurait été ordonné que les travaux de la reconstruction du pont Saint-André seraient faits conformément au procès-verbal de Lacroix, tel qu'amendé, et que le conseil municipal n'en pouvait faire un autre; que, par l'amendement du procès-verbal de Lucroix, partie des propriétaires dans les seigneuries d'Argenteuil sont exempts des ouvrages du pont, et que l'appelante ne peut prélever la répartition imposée par l'intimée sur tous les habitants de l'appelante, que l'intimée s'est laissée poursuivre par Moody, sans mettre l'appelante en cause, et que celle-ci ne peut être life par ces jugements. Par une seconde exception, l'appelante prétendit que l'assemblée des délégués du 2 février 1865 était irrégulière, et qu'elle avait outrepassé ses attributions;

que, parmi les soumissions faites à Harrington pour la construction du pont, s'en trouvaient de plus basses que celles de Moody; que la délégation faite à Cushing, préfet du comté, dans la séance du 28 février 1856, pour recevoir une des soumissions était nulle et contraire à la loi, enfin que tous les procédés qui avaient eu lieu, et ont été adoptés, tant par les délégués que par le conseil municipal de l'intimée, étaient nuls, illégaux et sans effet. Puis venait la défense au fond en fait. La contestation liée, les parties procédèrent à la preuve. L'intimée seul fit entendre des témoins au nombre de trois, lesquels établirent les faits de la demande. Il est également constaté, par la preuve, que Moody auquel fut adjugé le contrat était le plus bas soumissionnaire offrant les cautions et ayant rempli toutes les conditions exigée : par la municipalité pour l'obtenir. Le jugement rendu par la Cour Supérieure, à Sainte-Scholastique le quinzième jour d'octobre 1868, Berthelot, J., est comme suit: "La Cour, considérant que la demanderesse a suffisamment prouvé les allégués de sa déclaration, et que la défenderesse est mal fondée dans ses défenses et exceptions dont les allégués et prétentions ne sont pas prouvés. La Cour a renvoyé les dites défenses et exceptions, et condamne la défenderesse à payer à la demanderesse la somme de \$2,642.08, étant la part et portion que la défenderesse est tenue de payer, pour sa quote-part et proportion des frais de construction, et autres frais incidents et accessoires, pour la construction d'un pont, sur la rivière du Nord, au village de Saint-André, dans le comté d'Argenteuil, ainsi que mentionné en la déclaration, et en vertu d'un règlement ou résolution du conseil municipal du comté d'Argenteuil, en date du six décembre 1865, avec intérêt, sur ladite somme, à compter du jour de la signification, dix sept juillet 1866 et dépens." Ce jugement fut renversé en appel, pour les motifs énoncés au jugement de la cour d'appel comme suit: "The Court, considering that the cost of constructing the bridge mentioned in the declaration of plaintiff is neither alleged nor proved to have been paid by plaintiff to the builder, to whom alone the debt claimed is due and that, therefore, there is no privity of contract, no lien de droit between plaintiff and defendant, in respect of the sum demanded by the present action; considering that the construction and maintenance of the said bridge (a county work) are at the expense of and chargeable against certain inhabitants of certain local municipalities interested therein, and are not chargeable against any local municipality or municipalities in their corporate capacity; considering that no right of action lies, by one municipal corporation, against another, for the recovery of moneys paid for the construction

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or maintenance of any such work and that all such debts should be called by assessment through the instrumentality of the secretary-treasurer of the council of each municipality, from the inhabitants or any part of the inhabitants of which are chargeable therewith in the manner prescribed by chap. 24, 59th section, Lower Canada Consolidated Municipal Act, there is error. The Court abstaining from pronouncing upon the informalities urged by appellant against the proceedings adopted for the construction of said bridge, inasmuch as respondents, plaintiffs in the Court below, had no right of action, doth reverse." Monk J., dissenting. (3 R. L., p. 374; 13 R. L., p. 671.)

Jugement infirmé.

BELANGER & DESNOYERS, avocats de l'appelante.

LAFLAMME, avocat de l'intimé.

PROCEDURE. - SIGNIFICATION.

COUR SUPÉRIEURE, EN RÉVISION,

Montréal, 29 décembre 1871.

Coram MONDELET, J., BERTHELOT, J., MACKAY, J.

In re Martin et al., et Saint-Amour, syndic, et A. B. Stewart, réclamant et partie colloquée, et Charland, contestant.

Jugé: Que les significations faites au réclamant en cette affaire, à son bureau de syndic officiel et non à son domicile ou à personne, sont illégales.

Le 24 octobre 1870, le syndic officiel, Saint-Amour, rejeta la collocation de A. B. Stewart, qui était contestée par Charland, et maintint cette contestation. Sur l'appel de Stewart, un jugement fut rendu à Beauharnois, le 22 novembre 1870, Ramsay, J., confirmant la décision du syndic Saint-Amour, et mettant de côté la collocation de Stewart. Ce jugement fut porté en révision à Montréal. La signification de la contestation fut faite à Stewart, à son domicile, le 5 septembre 1870. La signification de la forclusion de répondre à la contestation et de l'ordre du syndic, Saint-Amour, de procéder à la preuve sur la contestation ex parte, le 20 de septembre, fut faite au bureau officiel, Stewart exerçant les fonctions de syndic officiel, à Montréal, le 15 septembre 1870, en parlant à son clerc, et non pas à son domicile. Le réclamant Stewart ne comparut pas à l'enquête. Le 11 octobre 1870, l'ordre du

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syndic Saint-Amour fixant l'audition au 17 octobre fut encore signifié au bureau officiel de Stewart à Montréal, et non pas à son domicile, ainsi qu'un avis d'inscription au mérite ex parte, toujours à son bureau officiel. Dans son factum, le syndic Stewart se plaignait de ce que la contestation de sa réclamation n'avait pas été signifiée à son bureau officiel de syndic, mais à une personne raisonnable de sa famille, le 5 septembre 1870. Dans son factum, le contestant prétendit que les significations étaient suffisantes. (1) La Cour de Révision adoptant le principe contraire et sur des motifs tout opposés, néanmoins favorables à l'appelant, a renversé les jugements, mais sans frais.

Per Curiam: Stewart files a claim for an amount due him as assignee to Martin, under the previous assignment. He appeals from a judgment of the assignee, conformed in the Superior Court, Beauharnois, on the ground that the service of one of the papers, at his domicile, is irregular, his pretension being that, as an assignee, he should be served at his office. The Court now declares that service valid, but finds that a previous notice to answer the contestation had been served on his clerk at his office. This is irregular, and all proceedings subsequent to said service are set aside, and Stewart allowed 8 days to answer. He is here acting as a private individual and may be served like any other person. Judgment reversed but without costs, as Stewart did not

urge the ground on which the judgment is based. Le jugement de la Cour est comme suit: "The Court sitting as a Court of Review, considering that there is error in the judgment, and that it has been rendered upon proceedings irregular, and that said judgment is erroneous, in holding that there is no irregularity in the proceedings, doth, revising said judgment, reverse the same, and, considering the service of contestation regular, but that all the proceedings before the assignee and the Court below since the notice for enquête for the 20th September, 1870, including the service of said notice were and are irregular, the service of said notice on 15th September, 1870, being irregularly made at the bureau of Stewart and not at his domicile nor on him personally, or for him at any lawful place; considering in like manner the service of notice for rehearing on 17th October, 1870, irregular, having been made on the 11th October 1870, at the bureau of Stewart, in Montreal, nor a personal service, nor at domicile, nor at lawful place, that Stewart was not in default for not attending on said 20th September, or 17th October, and that, therefore, the judgments against him were and are unwarrant-

⁽¹⁾ Secs. 49, 68, 70, 71, 125, loi de faillite de 1869.

bre fut encore al, et non pas in au mérite s son factum, estation de sa eau officiel de e sa famille, estant préten-.) La Cour de es motifs tout a renversé les

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The Court sitere is error in on proceedings in holding that n, revising said the service of ngs before the for enquête for of said notice otice on 15th he bureau of sonally, or for anner the ser-870, irregular, the bureau of or at domicile, lefault for not ober, and that, re unwarranted and ought to be vacated, including the judgment by the assignee of date 24th October, 1870, and the judgment of the Superior Court, at Beauharnois, of date 22nd November, 1870, doth vacate and set aside the same, and other proceedings to be recommenced before the assignee, as and after the 12th September, 1870, leave given to Stewart within eight days to answer said contestation." (3 R. L. p. 382; 2 R. C., p. 107.)

GIROUARD, avocat de l'appelant Stewart. A & W. ROBERTSON, avocate du contestant Charland.

CORPORATIONS MUNICIPALES.-ACTIONS POSSESSOIRES.

COUR DU BANC DE LA REINE, EN APPEL, Québec, 7 décembre 1871.

Présents: DUVAL, J. en C., CARON, BADGLEY, DRUMMOND, et MONK, J. J.

J.-B. HALL, demandeur en Cour de Circuit, appelant, et LA CORPORATION DE LA VILLE DE LÉVIS et al., défendeurs en Cour de Circuit, intimés.

Jugé: 1º Que si les officiers d'une municipalité entrent sur un immeuble pour y exécuter un procès-verbal ordonnant la réouverture d'un chemin sur cet immeuble, la Cour sans s'occuper de la question de savoir si le chemin existe, ou même si le procès-verba qui en ordonne la réouverture est régulier ou non, mais statuant uniquement sur le fait que le demandeur a été en possession pendant l'an et jour, maintiendra l'action possessoire portée contre la municipalité.

2° Qu'un propriétaire qui a enclos dans son terrain un ancien chemin public, et qui l'a possédé de cette manière depuis 'an et jour, a la possession voulue pour porter l'action en complainte contre la municipalité, et il n'importe pas que la destination du chemin n'ait jamais été changée.

3º Que si le demandeur dans une telle action conclut simplement au paiement des dommages par lui soufferts, sans conclure en aucune manière, ni au possessoire, ni au pétitoire, telle action est néanmoins une action possessoire.

L'appelant avait, par deux actes de 1854 et 1865, acheté deux terrains contigus, situés dans les limites de la ville de Lévis, entre la rivière Etchemin et le chemin à barrières. Le plan annexé à son premier acte indique un chemin traversant le terrain vendu, et conduisant à la rivière, c'était l'ancien chemin public abandonné par les voitures depuis que la commission des chemins à barrières avait été établie en cet endroit, mais qui avait servi depuis aux piétons. Trouvant ce chemin gênant pour quelques améliorations qu'il voulait faire sur son terrain, l'appelant adressa à la ville de Lévis une requête, (27 octobre 1866) demandant l'abolition du chemin

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qui, disait-il, avait été abandonné depuis plusieurs années. Il y eut contre-requête, et Hall, craignant pour le succès de sa demande, crut devoir la modifier, et demanda, (requête du 17 décembre 1868) au lieu de la suppression du chemin, la permission d'en changer la direction, et de l'établir à ses frais, sur un autre endroit de son terrain, de manière à donner accès à la rivière, par une voix plus courte et plus directe que celle suivie auparavant. Cette requête fut accordée, of Hall commença les travaux, il les discontinua peu de temps apr mais il avait, dans l'intervalle, enclos le vieux chemin dans propriété. La défenderesse le requit de compléter les travaux et livrer le nouveau chemin. Sur son refus de ce faire, elle révoqua la permission qu'elle lui avait donnée, et statuant sur requête des intéressés, nomma un surintendant spécial qui fit la visite des lieux, et dressa un procès-verbal (23 septembre, 1869.) Il y est constaté que ce chemin est l'ancien chemin public de la concession, que le procès-verbal d'érection en avait été perdu, et qu'il était nécessaire de maintenir ouverte cette voie de communication. Il conclut à la réouverture du chemin par l'inspecteur de la localité. Les représentants de Hall, présents à la visite du surintendant spécial, avaient déclaré qu'ils n'avaient rien à dire, et le procès-verbal fut homologué par le conseil. Hall avait cependant adressé une autre requête au conseil; il y demandait la permission d'étrblir à ses frais un canal à travers le vieux chemin, main'avait pas été donné suite à cette demande. Le 27 mai 18 après avis régulier donné à l'appelant, l'inspecteur de la division procéda aux travaux de réouverture, en exécution du procès-verbal, et défit la clôture que le demandeur avait fait placer pour fermer le chemin. De là, l'action en cette cause, portée en juin 1870. L'appelant y cite son titre d'acquisition, ajoute qu'il était, en vertu de ce titre, propriétaire en possession, depuis au-delà de l'an et jour, allègue le trouble dans cette possession par la ville de Lévis et Atkinson, l'autre défendeur qui avait, avec l'inspecteur, co-opéré aux travaux. Les conclusions, sans toucher à la question de propriété ni à la possession du terrain, demandent une condamnation solidaire contre les défendeurs pour \$200, montant des dommages soufferts. Le demandeur ne demande ni une mise en possession ni une défense de le troubler à l'avenir, mais seulement, comme dans une action en dommages, une condamnation à une somme d'argent. La défense a allégué: 1° Que le terrain mentionné en l'action avait été de toute ancienneté, et était encore un chemin public; 2º Que le procès-verbal de ce chemin ayant été perdu, la défenderesse avait fait et homologué celui du 23 septembre 1869, et que c'était dans l'exécution de ce procès-verbal que les travaux avaient été faits;

our le succès nda, (requête du chemin, la lir à ses frais, donner accès directe que ordée, or Hall temps apr nemin dans er les travaux ce faire, elle t statuant sur spécial qui fit 23 septembre, ancien chemin d'érection en ntenir ouverte réouverture du présentant de pécial, avaient ocès-verbal fut nt adressé une rmission d'étachemin, mai e 27 mai 18 teur de la diviexécution du leur avait fait en cette cause, e d'acquisition, aire en possese trouble dans son, l'autre déaux travaux. propriété ni à

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amnation solides dommages e en possession ais seulement, ondamnation à Que le terrain enneté, et était s-verbal de ce fait et homoait dans l'exéaient été faits; 3º Que la possession du demandeur, s'il en avait eu aucune, était la possession d'un chemin public, savoir d'une chose imprescriptible, qu'elle n'était pas animo domini, que sa possession était celle du public, que, partant, elle était vicieuse, et n'avait pas les qualités nécessaires pour faire la base d'aucune demande. Le demandeur répliqua: 1º Qu'il n'avait jamais existé aucun chemin à cet endroit; 2° Que le procès-verbal était irrégulier et nul. Examiné comme témoin, il admit et jura: 1º Qu'il avait connu, depuis nombre d'années, les terrains de la rivière Etchemin, et qu'il y avait toujours vu le chemin qui avait dû y exister longtemps auparavant; 2° Que ce chemin était, en 1869, dans le même état que lorsqu'il l'avait connu originairement; 3° Que les travaux dont il se plaignait avaient été faits par la défenderesse, pour mettre le chemin en bon état, et qu'il avait porté son action pour arrêter ces travaux. Au demeurant, et, comme nous l'avons déjà dit, la preuve constate que ce chemin avait été anciennement le seul chemin public de l'endroit, mais que, depuis l'établissement des chemins à barrières (environ 15 ans), les voitures avaient cessé d'y passer, mais qu'étant plus court que celui de la commission, il avait été depuis utilisé par les piétons.

DUVAL, JUGE EN CHEF.—Cette action est une action possessoire. Nous ne pouvons sanctionner la conduite de la corporation. Elle est entrée de force sur un terrain dont le demandeur était en possession depuis 3 ou 4 ans, et qui était enclos, elle a détruit la clôture et causé quelques dommages. La possession de Hall suffit pour faire maintenir son action, et nous ne pouvons nous occuper de la question si ce chemin était ou non un chemin public. Nous ne pouvons non plus entrer sur la question de savoir si les travaux ont été ou non faits en exécution d'un procès-verbal. Nous ne décidons rien quant à la légalité de ce document, ni quant à l'existence du chemin, et notre jugement est exclusivement basé sur la possession que le demandeur a eu de ce terrain depuis qu'il l'a enclos.

Drummond, Juge: Je désire bien faire remarquer que nous ne décidons pas la question de propriété, mais une simple question de possession. Le procès-verbal ne peut sur ce point être invoqué. Le défendeur a été troublé dans cette possession et quelle que soit la cause ou le motif du trouble, spoliato usante omnia restituendus est. Le jugement de la Cour de Circuit (STUART JUGE) sera partant renversé, et les défendeurs condamnés solidairement à \$100 de dommages, et les frais dans les deux Cours. (3 R. L. 389).

ASSIGNATION—PROCEDURE

COUR DE CIRCUIT, district de Richelieu, Sorel, 17 mai 1871.

Coram SICOTTE, J.

LE MAIRE ET LE CONSEIL DE LA VILLE DE SOREL vs NEWTON.

Jugé:—Que le rapport d'un huissier, sur un breí de Sommation, constatant "qu'il a pris les informations nécessaires, afin de trouver le défendeur, afin de lui signifier le bref de sommation, et qu'il a étinformé qu'il a laissé la province de Québec, et qu'il n'a plus de domicile dans les limites de la ville de Sorel, où il puisse faire la signification" n'est pas suffisant (le bref constatant que le défendeur était ci-devant de la ville de Sorel, et maintenant absent de la province de Québec, mais possédant des biens-fonds en la dite ville de Sorel) pour autoriser la signification par la voie des journaux, et, qu'en ce cas, l'action devra être déboutée sur exception à la forme.

Les demandeurs réclamaient du défendeur \$5.90, pour six années d'airérages de taxes dues et échues, sur un terrain désignée dans la déclaration, et situé dans la ville de Sorc!. Le défendeur était désigné dans le bref comme "gentilhomme, ci-devant de la dite ville de Sorel, et maintenant absent de la province de Québec, mais possédant des biens-fonds en la dite ville de Sorel." L'huissier chargé d'assigner le défendeur fit rapport que, le 20e jour du mois de novembre 1870, " j'ai pris les informations nécessaires, afin de trouver le défendeur, afin de lui signifier le bref de sommation de l'autre part, j'ai été informé que le défendeur a laissé la province de Québec, et il n'a plus de domicile dans les limites de la ville de Sorel, où je puisse faire la signification susdite, de ce enquis, j'ai fait le présent retour d'absence, pour servir et valoir en justice ce que de droit." Le défendeur plaida, par une exception à la forme, " que l'assignation en cette cause est irrégulière et nulle, et que la présente action ne peut être maintenue quant à présent, et doit être déboutée, pour entre autres informalités les suivantes: "1° Parce que le défendeur est désigné dans le bref de sommation, comme ci-devant de la ville de Sorel, et maintenant absent de la province de Québec, mais possédant des biens fonds en la ville de Sorel, tandis que le défendeur réside et a toujours résidé en la cité de Montréal, dans le district de Montréal, depuis qu'il a cessé de résider à Sorel; " 2° Parce qu'il est le seul John Newton qui possède des biensfonds en la ville de Sorel; 3° Parce qu'aucune copie de la décloration ne lui a été signifiée, bien qu'il réside et a résidé depuis plus de 10 ans dans la cité de Montréal, dans le district de Montréal; 4° Parce que le défendeur ne pouvait être assigné autrement qu'en lui signifiant une copie du bref de

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REL VS NEWTON.

ef de Sommation, s, afin de trouver tion, et qu'il a été n'a plus de domire la signification" était ci-devant de de Quebec, mais pour autoriser la cas, l'action devra

\$5.90, pour six ır un terrain délle de Sorci. Le e "gentilhomme, nant absent de la s-fonds en la dite r le défendeur fit e 1870, " j'ai pris le défendeur, afin utre part, j'ai été e de Québec, et il le de Sorel, où je enquis, j'ai fait le aloir en justice ce ne exception à la est irrégulière et maintenue quant utres informalités est désigné dans la ville de Sorel, ébec, mais posséndis que le défene Montréal, dans e résider à Sorel ; possède des biensne copie de la déréside et a résidé réal, dans le disr ne pouvait être copie du bref de sommation et de la déclaration à son domicile, dans la dite cité de Montréal. A l'enquête, les demandeurs admirent " que le défendeur résidait en la cité de Montréal, en la province de Québec, où il a son domicile, et qu'il y résidait et y avait son domicile lorsque la présente action a été intentée, et y a toujours résidé depuis."

JUGEMENT: La Cour, considérant que la dite exception est suffisante, pour repousser l'action des demandeurs, a débouté et déboute ces derniers de leur dite action, avec dépens." (3. R.

L. p. 394).

P. R. LAFRENAYE, avocats des demandeurs. ARMSTRONG et GILL, avocats du défendeur.

CONTRAINTE PAR CORPS-HUISSIER

COUR DE CIRCUIT, Montréal, 3 novembre 1870.

Coram BERTHELOT, J.

ALEXANDRE DUFRESNE, demandeur, vs D. Z. GAULTIER et J. EMERY CODERRE, défendeurs, et PIERRE BEAULAC, huissier mis en cause, et MICHEL MATHIEU, shérif mis en cause.

Jugé:—1° Qu'un bre de contrainte par corps, obtenu contre un huissier, pour avoir négligé de faire rapport, devant la Cour, de ses procédés sur un bref d'exécution à lui adressé. et ordonnant au shérif, d'appréhender au corps le dit mis en cause, et de l'incarcérer dans la prison commune du district de Montréal, et qu'il y soit détenu jusqu'à ce qu'il ait rapporté, devant celle cour, le dit bref d'exécution avec ses procédés sur icelui ou payé au dit demandeur le montant de la dette, intérêt et frais en cette cause, n'est pas suffisamment exécuté par le shérif, s'il n'a reçu de l'huissier qu'un rapport de ses procédés écrit sur le bref d'exécution, constatant que le dit huissier avait perçu des défendeurs le montant porté au bref d'exécution.

2º Que le shérif devait aussi exiger de l'huissier la remise des deniers qu'il avait ainsi perçus.

Le 14 octobre 1870, un bref de contrainte par corps émana, contre le mis en cause, adressé au shérif du district du Richelieu. Le bref est rédigé en ces termes: "Vu que, par un jugement rendu en notre dite Cour de Circuit, à Montréal, le quatorzième jour d'octobre 1870, sur une règle pour contrainte par corps, obtenue par le demandeur, contre le mis en cause, pour n'avoir pas satisfait à la dite règle lui enjoignant de faire rapport à cette Cour de ses procédés sur le bref d'exécution, émané en cette cause le premier jour d'octobre 1869, contre les biens meubles et effets des défendeurs solidairement, la dite règle fut déclarée absolue contre le mis en cause, et il y

a été ordonné qu'il serait incarcéré dans la prison commune du district de Montréal, jusqu'à ce qu'il ait rapporté devant cette Cour le dit bref d'exécution, avec ses procédés sur icelui, ou payer au demandeur le montant de la dette, intérêts et frais, savoir cinquante dollars de dettes, avec intérêt sur icelle à compter du 5 octobre 1867, et onze dollars et trente centins. frais sur l'action, et soixante-seize cents de frais subséquents. Nous vous ordonnons, en conséquence, d'appréhender au corps le mis en cause, et de l'incarcérer dans la prison commune du district de Montréal, et qu'il y soit détenu jusqu'à ce qu'il ait rapporté devant cette Cour le dit bref d'exécution, avec ses procédés sur icelui, ou payé au demandeur le montant de la dette, intérêt et frais, savoir, la somme de cinquante dollars' de dette, avec intérêt sur icelle à compter du 5 octobre 1867, \$11.30 frais d'action, et soixante-seize cents de frais subséquents, comme susdit, aussi la somme de \$4.69, montant des frais accrus sur la règle, et cinquante cents pour ce bref, ainsi que vos émoluments. Et vous nous rapporterez ce bref, avec vos procédés sur icelui, devant notre Cour de Circuit, à Mont-· réal, sans délai. En foi de quoi, nous avons fait apposer aux présentes, le sceau de notre Cour de Circuit, à Montréal, le quatorzième jour d'octobre 1870. (Signé)—HUBERT, PAPINEAU ET HONEY, G. C. C." Sur ce bref le shérif fit rapport que le mis en cause lui avait remis le bref d'exécution mentionné dans le bref de contrainte par corps ci-dessus, avec son rapport constatant qu'il avait reçu de l'un des défendeurs le montant porté au dit bref d'exécution. Sur ce le demandeur fit motion, qu'en autant qu'il appert que le shérif n'a pas exécuté le bref de contrainte par corps, comme il était tenu de le faire, en exigeant du mis en cause le paiement des deniers que, par son rapport, il déclare avoir perçu de l'un des défendeurs, le dit shérif soit emprisonné dans la prison commune, comme coupable de mépris de cour, jusqu'à ce qu'il ait payé le montant qu'il aurait dû exiger du mis en cause, à moins que cause au contraire ne soit montrée, etc. Le shérif répondit que le bref donnait à l'huissier l'alternative de faire rapport de ses procédés, ou de payer la dette, et que tout ordre contenu dans un bref de contrainte par corps devait être exprès, et que rien ne devait y être ordonné par inférence. Le demandeur, au contraire, soutenait que l'huissier ayant fait rapport qu'il avait perçu la dette, le shérif devait exiger de lui le montant perçu ou l'incarcérer jusqu'au paiement.

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JUGEMENT: "La Cour, après avoir entendu le demandeur sur sa motion du 2 de novembre courant, pour une règle contre Michel Mathieu, shérif du district de Richelieu, et aussi le shérif, avant d'adjuger sur la dite motion, ordonne péremptoirement au dit Michel Mathieu, shérif, d'exécuter le dit writ n commune orté devant és sur icelui, e, intérêts et rêt sur icelle rente centins, subséquents. nder au corps commune du 'à ce qu'il ait tion, avec ses nontant de la uante dollars' octobre 1867, e frais subsémontant des ce bref, ainsi ce bref, avec rcuit, à Montapposer aux à Montréal, le ERT, PAPINEAU rapport que le on mentionné avec son rapndeurs le mondemandeur fit n'a pas exél était tenu de nt des deniers 'un des défenson commune, qu'il ait payé cause, à moins shérif répondit e faire rapport ut ordre conlit être exprès, ce. Le demant fait rapport iger de lui le ıt.

le demandeur ne règle contre ieu, et aussi le lonne pérempiter le dit writ

ou bref de contrainte par corps, émané de cette Cour, le 14 octobre dernier, contre le dit Pierre Beaulac, et de faire son rapport, le ou avant le 10 novembre courant, devant cette Cour, et, à cette fin, le dit Michel Mathieu est autorisé à reprendre le dit writ ou bref de contrainte, pour l'exécuter incontinent, suivant le présent jugement." L'honorable juge dit que, si le shérif n'obligeait pas l'huissier à payer le montant perçu, il accorderait la règle contre lui, et il blâma le shérif qui prétendait justifier sa position par des autorités légales. Autoritées citées par le shérif. Attachment: 1º Attachment will not lie on a rule of Court, unless for disobedience of some express direction. 2. An order was made by consent, in an action of ejectment, "that the proceedings be stayed, the defendant to pay his own costs of a former ejectment, and the les-or of the plaintiff to pay £5, towards the defendant's costs, and to grant a lease of the premises for 21 years, at the rent of 1s. a year, on the same conditions, as other parts of the Estates of the lessor of the plaintiff, in the parish, were held." The defendant having declined to accept a lease and execute a counterpart, the Court refused to grant an attachment against him." (The order contains no direction as to the acceptance of the lease by Bywater, and the execution of a counterpart.) I am not aware of any case of an attachment for disobedience of an implied direction. I am of opinion that an attachment ought not to be granted in this case. I have always understood that an attachment for contempt goes only where the party has been called upon to do, and has wilfully omitted to do some specific act. The same strictness is usually observed by the court, in enforcing performance of its own ordinary rules." The Earl of Cardigan and others vs Bywater, Common Bench Reports, vol. 7, p. 794, WILDE, C. J. (3 R. L., p. 428.)

TIERS-SAISI-APPEARANCE.

SUPERIOR COURT, Montreal, 19th February, 1874.

Coram BEAUDRY, J.

FORBES et al. vs LEWIS, and THE GLOBE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Tiers-saisis.

Held:—Tiers-saisis, in answer to a writ of saisie-arrêt after judgment, have no right to appear by Attorney, and an appearance fyled by an Attorney for such tiers-saisis will be rejected from the record upon motion.

Motion to reject appearance by *tiers-saisis* granted. (18 J., p. 74.)

JOHN L. MORRIS, for plaintiffs. L. H. DAVIDSON, for tiers-saisis.

EFFET DES OBLIGATIONS.

SUPERIOR COURT, Montreal, 28th February, 1874.

Coram TORRANCE, J.

PELLETIER 28 RATELLE.

Held:—That the allegations of a declaration, founded upon notarial deeds of sale, seeking to fasten a personal liability upon defendant towards plaintiff, will not be proved by a declaration made by defendant in another deed to a third party; no lien de droit is thereby created between plaintiff and defendant.

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PER CURIAM: The declaration of plaintiff sets forth a deed of sale, 24th July, 1860, Hétu, notary, by which plaintiff sold to Alexis Wolfe a piece of land, on Beaudry street, in the city of Montreal, for \$200, à constitution de rente, being an annual and perpetual rent of \$12, payable to plaintiff in advance on the 24th July; that, on the 9th March, 1863, Wolf sold the land to defendant for the same rent which he undertook to pay to plaintiff, and promised to furnish to plaintiff a copy of his deed of sale duly registered. The land was mortgaged in the usual terms, for the payment of the rent and capital; that defendant has never supplied the copy of said deed for which plaintiff has been obliged to pay \$2, and 70 cents for the certificate of registration; that defendant has never paid to plaintiff the rent falling due on 24th July, 1872, or that due on 24th July, 1873, forming, with the cost of the registered deed, \$26.70; that, by deed 26th August, 1867, Mathieu, N.P., defendant sold the land to Jean-Jte Rivet and Pierre Malo for \$600, and defendant declared by said deed, that he had created in favor of plaintiff a rente constituée of \$12.00, payable annually, and, further, that, in case of sale, exchange or other alienation of said land, plaintiff would have the right to exact, in one payment, the capital sum of \$200, and arrears of said rent; that, later, the land was sold, by the sheriff of Montreal, for a nominal sum, without preservation of the claim of plaintiff, for which defendant was personally responsible; that plaintiff, being deprived of her right of bailleur de fonds, by the acts and negligence of defendant, has a right to claim from him the capital and arrears of said rent. Plaintiff accordingly makes a claim against defendant, for \$226.70 less \$69.85 received by her from the Sheriff. The defendant pleads the general issue; and, also, that there is no lien de droit between plaintiff and him. The Court does not see that. by the deed from defendant to Rivet and Malo, 26th August, 1867, there was established any lien de droit between plainary, 1874.

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forth a deed plaintiff sold et, in the city being an aniff in advance 33. Wolf sold e undertook aintiff a copy mortgaged in capital; that eed for which s for the cernever paid to 2, or that due he registered lathieu, N.P., Pierre Malo that he had \$12.00, payaexchange or ve the right D, and arrears he sheriff of vation of the nally respont of bailleur t, has a right rent. Plaint, for \$226 70 ne defendant is no lien de not see that, 26th August, tween plaintiff and defendant, allowing the Court to enter judgment against defendant for the balance of \$156.85, claimed by the action. The action is dismissed. (18 J., p. 75.)

ROCHON, for plaintiff. Augé, for defendant.

COURT OF APPEALS .- CONSTITUTION.

COURT OF QUEEN'S BENCH, Montreal, 17th March, 1874.

Coram Taschereau, J., Ramsay, J., Sanborn, J., Loranger, A. J.

THE MAYOR, &c. OF MONTREAL, Appellant, and DRUMMOND, Respondent.

Held:—That an appeal, of which two Judges ad hoc (under article 1161 and 1162 of the Code of Civil Procedure) have "taken judicial cognizance," by having heard the case and ordered a rehearing, must be reargued before such two judges as part of the Court, notwithstanding that one of the Judges of the Court, who was replaced by one of such Judges ad hoc, has ceased to be a Judge of the Court and has been replaced by another permanent Judge, and notwithstanding that the other Judge, originally replaced by a Judge ad hoc, has been replaced by an Assistant Judge.

TASCHEREAU, J.: When this case was called for argument, the counsel of appellants contended that Justices MACKAY and TORRANCE, who had been appointed Judges ad hoc, in place of Justices Drummond and Monk, who were incompetent, should form part of the Court, notwithstanding that Judge Drummond had ceased to be a Judge of this Court, and had been replaced by M. Justice RAMSAY, as a permanent Judge of the Court, and, notwithstanding that M. Justice LORANGER is now Assistant Judge of this Court, in place of Judge MONK. After taking time to consider, we are all of opinion, inasmuch as Justices Mackay and Torrance heard the case, and joined in the order for a re-hearing, that they have "taken judicial cognizance" of the case, and, consequently, that under the provisions of Article 1163 of the Code of Civil Procedure, they must continue to form part of the Court at the present re-hearing.

RAMSAY, J: Called Counsel's attention to the fact that, if a fifth Judge be required, he must, in terms of the Code, be a Judge of the Superior Court, and therefore, that he would

seem to be incompetent to sit in the case at all. (1) Suggestion of appellant's Counsel sustained. (18 J., p. 76, et 5 R. L., p. 298.)

ROUER ROY, Q. C., for Appellants. LACOSTE & DRUMMOND, for Respondent.

Expropriation.—Action of Indomnity.—Compensation.—Closing one End of a Street not an Interference with the Rights of the Owners of Houses adjoining thereto.—Art. 407 of the Civil Code of Canada—27 and 28 Vict., c. 60 (Canada.)

PRIVY COUNCIL, 16th MAY, 1876.

On Appeal from the Court of Queen's Bench for Lower Canada, in the Province of Quebec.

Present: Sir James W. Colvile, sir Barnes Peacock, sir Montague E. Smith and sir Robert P. Collier.

THE MAYOR, ALDERMEN, and Citizens of THE CITY OF MONT-REAL, Defendants, and THE HONORABLE LEWIS THOMAS DRUMMOND, Plaintiff.

Declaration that Plaintiff had built eight houses fronting on St. F. Street which at one end opened into B. Street, and at the other into St. J. Street and that these houses, being in immediate proximity to the B. Jt. Street and Trunk Railway Company, had acquired great value as boarding houses and shops; that, the Defendant municipal corporation of the city, "without any previous notice to the Plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, et par voic de fait closed up St. F. Street, and built from the south end of his houses to the opposite side of the street a close wooden fence about fifteen feet in height;" that in consequence the street had become a cul-de-sac, and the occupants of the houses had lost their natural means of egress and ingress."

Pleas, that the Defendant corporation in closing the street had not committed un acte de violence et illégalité ou une voie de fait, that they had only exercised a privilege and used a power conferred upon them by their charter of incorporation, et qu'en exerçant ce privilège ils n'ont pas empiété sur la propriété du demandeur; that in the several Acts of Incorporation of the city the Legislature had specially disignated the cases in which they were liable to indemnify individuals from the damages resulting from the exercise of their powers, that is to say: L'expropriation forcée; 2. Le changement de site desmarchés; 3. Le changement de niveau des trottoirs; that whilst acting within the limits of their powers they were not responsible for damage; and that the street n'a pas été obstruée en face des maisons ou de la propriété du demandeur, et ses locataires ont actuellement entrée et sortie par la dite rue.

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It appeared that the corporation closed the street under the authority of a by-law made in pursuance of 23 Vic., c. 72; that the only effect of ma-

⁽¹⁾ The Court subsequently assembled, composed of TASCHEREAU, J., RAM-SAY, J., SANBORN, J., MACKAY, J., ad hoc, TORRANCE, J., ad hoc, and ruled, (RAMSAY & MACKAY, JJ., dissenting) that Judge RAMSAY was competent to sit.

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onting on St. F. other into St. J. ity to the B Stad great value as ipal corporation and without any lly, wrongfully, the south end se wooden fence eet had become r natural means

e street had not fait, that they il upon them by ge ils n'ont pas il Acts of Incornated the cases on the damages ay: 1. L'exproce changement de of their powers reet n'a pas été deur, et ses loca-

or the authority nly effect of ma-

EREAU, J., RAMl hoc, and ruled, competent to sit. king the street a cul-de-sac, so far as the rights of access and passage are concerned (apart from the loss of customers), is that the Plaintiff's tenants have to go by other streets and further to reach the southern part of the city. There was no evidence of special damage by reason of the loss of customers; nor of deprivation of light to an actionable degree:—

Held, that assuming the Plaintiff to have rights in St. F. Street which had sustained damage, his property had not been invaded in a way to constitute une expropriation, nor had he established an injury which would give him a right to a previous indemnity under Art. 407 of the Civil Code, so as to make the corporation wrong doers, and their act in closing the street a trespass and une voic de fait because such indemnity had not been paid. His claim (if any) should be prosecuted under the provisions of the Act relating to expropriations by the corporation (27 & 28 Vict. c. 60.)

By the law of France the closing one end only of a street is not such an interference with the rights possessed by the owner of houses adjoining thereto of access and passage as will give a claim to compensa-

tion

The special Acts relating to this corporation must be read in connection with 27 & 28 Vict. c. 60, which prescribes the particular mode in which the compensation payable to any party "by reason of any act of the council for which they are bound to make compensation" should be ascertained. But actions of indemnity for damage in respect of such acts are excluded by necessary implication; for they assume that the acts in respect of which they are brought are unlawful whilst the claim for compensation under the statute supposes that the acts are rightfully done under statutable authority.

Jones v. Stanstead Railway Company (1) approved.

This was an appeal from a judgment (June 20, 1874) of the Court of Queen's Bench (appeal side) for Lower Canada confirming with costs in favour of the Respondent above named a judgment of the Superior Court (September 30, 1872), also in favour of the respondent. The action in which the judgments were passed was brought on the 27th of July, 1868, by the Respondent, to recover from the Appellants compensation for injury caused to several houses belonging to the Respondent, by the acts of the Appellants in stopping up a street called St. Felix street, under the following circumstances: The respondent had been for many years the owner of a plot of land in the city of Montreal, in the form of a parallelogram, bounded at the two ends respectively by Mountain street and St. Felix street, and on one side by Bonaventure street and on the other side by the railway station of the Grand Trunk Railway of Canada. St. Felix Street, until the events hereinafter mentioned, after passing the property of the Respondent, crossed the railway of the Grand Trunk Railway Company, close to the platform at which most of the passengers from the passenger trains alighted, and joined the street on the other side of the railway.

⁽¹⁾ Law Rep. 4 P. C., 98, et 23 R. J. R. Q., p. 51.

In 1854 and 1855 the Respondent built upon his plot of land certain tenements, some of which fronted on St. Felix street, one of which in the south west corner, abutting on the railway, was in 1866 converted into a small hotel; the houses in St. Felix street, were greatly enhanced in value by reason of their proximity to the station, though passengers, in order to reach the street from the platform, were obliged to pass along some yards of railway and cross the switches and sidings, which was contrary to the regulations of the company. Down to 1862, St. Felix street ran from St. Joseph street, on the south side of Bonaventure street to Bonaventure street, but in that year it was continued and opened out on the north side of Bonaventure street, and the Respondent paid the Appellants \$103.70 as his share of the expenses incurred in opening out the street. In the year 1863, the Grand Trunk Railway Company obtained an Act of Parliament empowering them to construct in the neighbourhood of Chaboillez square a station for the city of Montreal, in pursuance of which they greatly enlarged the old passenger station of the Lachine line abutting upon Bonaventure street, and in the same year removed their passenger traffic from some distance outside Montreal to the new station. On the 14th of January, 1864, they entered into an agreement with the Appellants to enlarge the station, and transfer thither their goods traffic also, the Appellants undertaking on their part to close St. Felix street, and to open a new street to the south of the station, to be called Albert street. On the 11th of september, 1866, the following by-law to discontinue a portion of St. Felix street was passed by the council of the city: "Whereas it is deemed expedient, in the interest of the public, to open a new street from Chaboillez square to Mountain street, and to discontinue a portion of St. Felix street, " It is ordained and enacted by the said council, and the said council do hereby ordain and enact: "That a street to be called Albert street be opened from Chaboillez square to Mountain street at a width of 80 feet English measure; and that that section of St Felix street, tinted red on the plan hereunto annexed, extending from the line of the said Albert street towards Bonaventure street and measuring 171 feet 6 inches, on the south-west line of St. Felix street, and 176 feet on the north-east line thereof be henceforth discontinued." The transfer of the business of the railway to Bonaventure station was carried out by the end of 1866; it necessitated the laying of a large number of rails from the station to Mountain street, and the construction of sidings for the shunting and marshalling of trains; and the level crossing at St. Felix street was thereby rendered very dangerous. Thereafter the Appellants, the corporation

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plot of land Felix street. the railway. ouses in St. by reason of in order to to pass along and sidings, pany. Down on the south but in that north side of e Appellants opening out ailway Coming them to are a station they greatly e line abutme year reance outside of January, e Appellants goods traffic t to close St. south of the of september, portion of St. : " Whereas olic, to open a street, and to ordained and il do hereby Albert street n street at a section of St ed, extending Bonaventureuth-west line line thereof e business of d out by the e number of he construcng of trains; eby rendered corporation

of Montreal (who were incorporated by 4 Vict. c. 36, various powers for the regulation of the city having been conferred on them by successive enactments of the Canadian legislature), in June, 1867, caused to be erected a solid wooden barrier 12 feet high from the southern corner of the Respondent's tenements immediately adjoining the said hotel, across St. Felix street. The declaration stated that in or about the month of June, 1867, "the said Defendants, without any previous notice given to the Plaintiff, without any indemnity being previously offered to him, forcibly, illegally, wrongfully, et par voie de fait, closed up the said St. Felix street, and built up, or caused or permitted to be built, from the south end of his the said Plaintiff's house in the said St. Felix street to the opposite side of the same street, a close wooden fence, fifteen feet or thereabouts in height." That in consequence of the construction of the said fence that part of the said St. Felix street whereon the Plaintiff's houses are built has become a cul-de-sac, the occupants of the houses therein have lost their natural means of egress and ingress, and have been deprived of their ordinary means of support. "That one of the tenants of the said Plaintiff who occupied several tenements at the south-east corner of the said St. Felix street, at the time of the closing thereof as aforesaid, as a restaurant and hotel or boarding house soon after, to wit, within three weeks from the construction of the said fence, abandoned the premises leased to him by the Plaintiff, for the reason that his business had been entirely destroyed by the closing of the said street as aforesaid, the portion of the said street in question on which the Plaintiff's houses are built has been to a great extent deprived of light." That in consequence of the closing up of the said street the costs of making and maintaining that part of the said street which lies before his said houses has been thrown upon the Plaintiff for all times hereafter. "That he hath been otherwise and still more damnified by the loss of the prospective value of all his said property in the said St. Felix street, the Plaintiff alleging that had it not been for the grievance and trespasses committed by the Defendants, the said last-mentioned property, would in all probability, and especially in view of various improvements contemplated and about to be undertaken in the immediate vicinity thereof, have at least trebled in value within three or four years from this day." That by reason of all which premises that have been hereinbefore alleged, the Plaintiff had suffered damage to the amount of \$6000." The Appellants. in their plea of the 23rd of September, 1868, traversed the allegations of the Respondent, except so far as they might be directly admitted by the plea, and said they

were not responsible for the damages which the Respondent claimed to have suffered; and that, supposing he had sustained damage under the circumstances mentioned in the declaration they were not bound to make him compensation, and proceeded: "Qu'en fermant la rue St-Félix, les défendeurs " n'ont pas commis un acte de violence, d'illégalité, ou une voie " de fait, comme le prétend et l'allègue erronément le de-" mandeur, mais ils n'ont fait qu'exercer un privilège, user "d'un pouvoir qui leur a été conféré positivement par leur "charte d'incorporation, et qu'en exerçant ce privilège " ils n'ont pas empiété sur la propriété du demandeur." " Que dans les différents actes d'incorporation de la cité de "Montréal, le législateur a désigné spécialement les cas où " la dite cité serait tenue d'indemniser les individus pour les " dommages qui pourraient leur résulter de l'exercice d'aucun " des pouvoirs conférés à la dite cité, savoir : 1. L'expropria-" tion forcée; 2. Le changement de site des marchés; 3. Le " changement de niveau des trottoirs dans la dite cité; hors "ces cas, la dite cité, tant qu'elle n'excède point ses attribu-" tions et n'agit que dans les limites de ses pouvoirs, n'encourt " aucune responsabilité vis-à-vis des tiers. " En conséquence, " les défendeurs invoquent cette règle de droit, Qui jure suo " utitur, damnum non facit. " Que la dite rue St-Félix n'a " pas été obstruée en face des maisons ou de la propriété du " demandeur, et ses locataires ont encore actuellement entrée " et sortie par la dite rue, et le demandeur, par suite de la " fermeture de la dite rue, dans la ligne sud est parallèle à sa " propriété, n'éprouve aucun dominage par diminution du " loyer ou des vues, et il n'est pas obligé à l'entretien de la " dite rue St-Félix plus qu'auparavant." Enfin les dommages " réclamés par le demandeur sont d'une nature équivoque et " incertaine, et il ne peut légalement les établir. " Pour quoi les " défendeurs concluent au débouté de l'action du demandeur "avec dépens." The Respondent answered this plea on the 26th of October, 1868, and afterwards by an incidental supplementary demand of the 21st of November, 1870, raised his claim for damages to \$12,000. On the 21st of December, 1870, the cause came on for hearing in the Superior Court before Mr Justice Berthelot, who, on the 29th of April, 1871, gave an interlocutory judgment, ordering that three experts should be appointed to examine and report what was the amount of the damage sustained by the Respondent. On the 20th of May, 1872, the experts filed separate reports estimating the damages respectively at \$2,000, \$3,000 and \$4,000. On the 26th of June, 1872, the cause came on again for hearing on the merits before Mr. Justice BEAUDRY, and on the 30th of September, 1872, the Court gave judgment in favour of the Respondent for \$3,000, with interest and costs.

e Respondent Here follow the terms of that judgment: "La Cour, après e had sustain-" avoir entendu les parties, examiné la procédure, ainsi que les l in the decla-"rapports distincts faits par les trois experts nommés en verpensation, and "tu du jugement interlocutoire, en date du 29 d'avril 1871, les défendeurs " et délibéré : Considérant que, par le dit jugement interlocuité, ou une voie "toire, le droit d'action du demandeur se trouve implicitenément le de-"ment reconnu, quant à la demande principale, et que la orivilège, user " demande supplémentaire, et les prétentions des défendeurs ement par leur " ont été écartées, et que la cause a été renvoyée aux dits exce privilège e perts pour constater et établir quels dommages le demandeur demandeur." "a soufferts par suite des faits dont il se plaint et nomméa de la cité de " ment de la fermeture de la dite rue St-Félix, et de la clôture ent les cas où " érigée dans la ligne sud-est de la propriété du demandeur ; vidus pour les "considérant que les dits experts ne se sont pas accordés sur ercice d'aucun "l'évaluation des dits dommages, l'expert John Pratt les ayant . L'expropria-" évalués à deux mille dollars, l'expert Daniel Gorrie à trois narchés; 3. Le " mille dollars, et l'expert Victor Hudon à quatre mille doldite cité; hors " lars ; considérant que la Cour n'est maintenant appelée qu'à nt ses attribu-" adjuger sur le montant à accorder au demandeur et est justioirs, n'encourt " fiable d'adopter la moyenne de ces estimations : condamne n conséquence, " les défendeurs à payer au demandeur, pour les dommages Qui jure suo " par lui réclamés dans sa demande principale, la somme de e St-Félix n'a " trois mille dollars, avec intérêt de ce jour, et les dépens, repropriété du "jetant la demande supplémentaire, avec dépens." llement entrée The present Appellants appealed from that judgment to the par suite de la parallèle à sa diminution du

The present Appellants appealed from that judgment to the Court of Queen's Bench for Lower Canada, and the Respondent presented a cross-appeal claiming that the damages should be increased, and the two appeals came on for hearing on the 16th of September, 1873, before DUVAL, C. J., BADGLEY, TASCHEREAU, MACKAY, and TORRANCE, JJ., and were reheard on the 17th of March, 1874, before TASCHEREAU, RAMSAY, SANBORN, MACKAY, and TORRANCE, JJ., and on the 20th of June, 1874, the Court gave judgment confirming the judgment of the Court below, and dismissing both appeals with

costs, MACKAY and TORRANCE, JJ., dissenting.

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Here follow the remarks of the judges in appeal.

MACKAY, J., (dissentions).—In July, 1868, Drummond sued the Corporation, charging it with having, in 1867, illegally, forcibly, and by voie de fait, closed up St. Felix street, by setting up a fence across it, upon the line of which street he had previously built a lot of tenement houses, some occupied as taverns or inns. He claimed \$6,000 damages. These are not claimed as structural damages, but consequential. He says that his houses were rendered less valuable after the erection of the fence, they were not as accessible as before, they were thrown into a cul-de-sac, &c. The Corporation pleaded that it never committed voie de fait; but, in the ex-

ercise of its right, had shut up part of St. Felix street; that it had not appropriated to itself any land or property of Drummond's, and that plaintiff had no right to indemnity whatever. In 1871, the case was sent to three experts, for a report as to what damages Drummond had suffered. They differed, one reporting \$2,000 damages, another \$3,000, and the third \$4,000; by the final judgment, pronounced in 1872, the Court below adopted the mean between the two extremes found, and Drummond was allowed \$3,000 damages, with interest and costs. Both parties appeal; the Corporation claims that the action ought to have been dismissed; Drummond complains of the reference to experts, and insists that he ought to have obtained his conclusions in full, the \$6,000 and even more, namely, \$12,000, under a supplementary demand which he made in 1870, but which has been disregarded. I take up the case upon the appeal by the Corporation. It appears that St. Felix street, in 1854-55, ran only from Bonaventure street, south-eastwardly, to St. Joseph street. It was the next street west of Bonaventure Station. Drummond built upon it in The Lachine Railway Co., before that, built the those years. Bonaventure Station, and used it; the Grand Trunk Railway Co., in 1861, commenced to use it, and, afterwards, made it, (in lieu of Point St. Charles), its principal passenger depot. By the Act of Parliament, 23 Vic., c. 72, the Corporation has power to make by-laws, to alter and discontinue streets, and in exercise of this power, it made a by-law on the 11th September, 1866, and ordered St. Felix street to be shut up, and, in 1867, a fence was erected across it, accordingly. This deprived Drummond, and everybody else, of right of way along St. Felix street, if wishing to go from Bonaventure street towards St. Joseph street, or to come from St. Joseph to Bonaventure street, by crossing the rails of the railway Companies. It, however, left Drummond, and his tenants, as free as before to move in the other direction, that is, towards Bonaventure street, or to get from Bonaventure street to their houses on St. Felix street. As to the Corporation having, illegally, forcibly and by voie de fait, closed part of St. Felix street, as is charged by Drummond's declaration, which charge he ought to have proved to maintain his action, nothing of the kind occurred. The negative is proved. Proof against the Corpor in having committed voie de fait is by Drummond's lactum, as respondent upon the appeal by the Corpora va. Upon page 3 of it, he says that he does not deny "them (the Corporation) the right of closing up St. Felix street; for by "their by-law, ch. 29, p. 369, of the Municipal Laws of "Montreal (sanctioned by the 23 Vict., ch. 73, S. C.) they " are authorized to discontinue any street, whenever in their

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street; that it rty of Drumity whatever. a report as to differed, one id the third 72, the Court remes found. with interest n claims that mmond comhat he ought 00 and even emand which ed. I take up appears that enture street. ie next street ilt upon it in hat, built the unk Railway ords, made it, senger depot. rporation has e streets, and he 11th Sepshut up, and, gly. This deof way along re street towto Bonavenompanies. It, free as before Bonaventure houses on St. ally, forcibly as is charged ught to have ind occurred. poration ha-

n. Upon em (the Correet; for by pal Laws of , S. C.) they ever in their " opinion, the safety or convenience of the inhabitants of the "City shall require it." True that he adds: "But the respondent asserts that, notwithstanding the power conferred upon appellants, to discontinue streets generally, the manner in which they abused that power in this instance places them in the position of trespassers, in so far as the valuation of damages is concerned." Why so? Because of a principle fundamental in the laws of all civilized countries "that no citizen can be legally deprived of his property, for the benefit of the country or community of which he forms merely a unit, without full indemnity being paid to him before being dispossessed," general principle, in cases of expropriation, which is not denied, and of which I shall say more by and by. The judgment d quo has found Drummond entitled to recover from the Corporation \$3,000, in compensation for damages sustained, by the Corporation shutting up the street. The Corporation claims to have only exercised the power granted to it by Act of Parliament. The principal question is whether, under the facts proved, to support Drummond's claim, the Court below was warranted in condemning the Corporation. That depends upon the view the Court may take of the powers of the Corporation, under their Charters, and of Drummond's rights, seeing those powers of the Corporation. Drummond insists that the corporation is bound to pay him damages; though (as I said before) he admits that it had the right of closing St. Felix street, as undoubtedly it had. Decisions and authorities have been referred to by Drummond. which have not application to the case before us, which is not a case of retrait for utilité publique, nor one of jours, or rues, from houses having been taken away; nor is it like the case of a privation d'eau, nor of the lowering, or raising of a street, damaging the adjoining properties. Drummond has not had any land taken from him. The case, however, stated in plaintiff's declaration turns out what Drummond, by his factum, admits it to be, i. e., the Corporation having had the right to close part of St. Felix street, did close it; but, whereas it is a principle that no citizen can be deprived of his property for the benefit of the community, without previous payment of indemnity, the Corporation not having made or offered any such indemnity, is to be held abuser of its power and no better than trespasser. That is Drummond's proposition, as I understand it. Is it sound? Was the Corporation bound, under pain of being reputed trespasser, to make any indemnity to Drummond before running that fence across St. Felix street? Is it liable, by law, to pay him damages? The law and by-law have been already stated, and are admitted. My own ideas are these; that the Legislature, when

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making the law (the Corporation Charter) was not ignorant that some damage might be caused by the Corporation closing streets, and that irritations might arise; nevertheless it enacted as we read. When the Legislature authorizes works to be done, and means compensation to be given to persons damaged in their possessions by them, it orders it. Road Acts authorize alterations of lines of roads; semetimes satisfaction is ordered to be made to persons whose property is damaged, but sometimes not. Horse railway companies get powers from Parliament, making streets and property much less enjoyable than before, and sometimes injuriously affecting an individual's property, by making his access to his door disagreeable or difficult; yet, they cannot be sued in damages, if the Legislature has not ordered them to make compensation in such cases. Compensation, in expropriation cases, is our general rule, and our Code Civil has an article on the subject. corporation of Montreal is bound expressly, by its Act of 1864, to make compensation for all land taken by it. Drummond's case is not one of expropriation. Compensation clauses are sometimes enacted for cases like his; sometimes not. In the case of altering a market place, this Corporation is ordered to indemnify all who may be damaged. So, when it alters levels of footpaths, to the damage of private property, it is ordered to make indemnity. It has been authorized to close streets and no compensation for damages alleged by indivi-This is significant and fatal, I think, to duals is ordered. Drummond. I found, upon a series of decisions of English Courts, from 1792 downwards, also upon American cases and the French law. 1st. For the English case, there is the case of the Governor of the British Cast Plate Co. v. Meredith et al., 4 T. Rep. p. 794, cited by the Corporation. 2nd. Rex v. Directors of the Bristol Dock Co., 12 East R., p. 428, A. D. 1810. 3rd. Sutton v. Clark, 6 Taunton, p. 29, A. D. 1815. In this case, it was held that the defendants had a public trust to perform, a public duty was cast upon them; they have acted not maliciously, but to the best of their judgment; though damage be caused to an individual, defendants are not liable. 4th. Boulton v. Crowther, 2 Barn, & Cr., p. 703. A. D. 1824, cited by the Corporation. This is what was held: "Can an action be maintained against a Corporation, which in execution of a public trust, and for the public benefit, does an act which by law it may do, but which act works injury to an individual? No!" The statute giving no remedy, there is none, per Abott, Ch. J. 5. The London & N. W. Ry. Co. v. Bradley, 6 English Ry. cases, A. D. 1851. In this case the Lord Chancellor said :- "Whether an action will lie on behalf of a man who sustains a private injury, by the execution of

not ignorant ation closing cless it enacworks to be ons damaged Acts authotisfaction is is damaged. powers from ess enjoyable g an indivi-disagreeable es, if the Leation in such our general ubject. This s Act of 1864, Drummond's clauses are not. In the n is ordered when it alters roperty, it is ized to close d by indivi-, I think, to s of English nerican cases there is the Co. v. Mereration. 2nd. st R., p. 428, p. 29, A. D. dants had a upon them; f their judgl, defendants & Cr., p. 703, at was held: ion, which in nefit, does an ks injury to edy, there is V. Ry. Co. v. this case the lie on behalf execution of

parliamentary powers exercised judiciously and cautiously, is not an easy question, or, rather, it is not easy to come to a conclusion that an action will lie. I entertain a decided opinion (probably, however, erroneous) that no such action will lie." 6. The Caledonian R. Co. vs. Ogilvy, 2 McQueen's Scotch Appeals, p. 229, A. D. 1857. In this case, it was said, p. 251: "Where is the difference between a public river and a public road? The rights of both are common. If you have only that common right which belongs to all, you cannot claim compensation in regard to a damage caused to either one or other under acts which is authorized by Parliament." The rulings, in the cases that I may referred to are against Drummond's claims, and completely in favor of the Corporation. Such rulings are frequent, in railway and dock cases, and others of mere private enterprise; a fortiori, ought they to be in cases like the one before us, where defendants are acting as a City Corporation, for the benefit of the public, and not for any private gain. 7. Cushing's Reports show that, in Massachusetts, the English decisions that I have mentioned would be followed. It states a case nearly all fours with the one before us. Nos 428-437, 1 Sourdat. I find that the Corporation did the work or act complained of within the scope of its power. power derived from Parliament; the work was not done wrongfully; no malice nor faute is proved. It is impossible to see faute in the Corporation, in the face of the fact proved, namely, of the dangers that beset all persons who, before the erecting of the fence, across St. Felix street, might attempt to go along the street, across the railway tracks. Look at what Hannaford says: "With the constant moving and shunting of trains near the station and across St. Felix street, I consider it would have been the most dangerous place of all the Grand Trunk crossings in existence. There are fully fifty regular trains going and arriving daily at the station, without counting the shunting. If the street had remained open, it would have been really impossible for the public to use it, because the cross-gates which would have had to be erected would have been closed almost all the time and it would have so barred the traffic that people would have been obliged to come through another street." The Corporation plainly was bound to shut up St. Felix street as it did. Was it to wait till men. women and children should be killed? But its right to shut it up has been admitted. For the loss occasioned to Drummond it is not liable. When the G. T. R. ran rails across St. Felix street it diminished his easement; yet, he never thought of suing them, and would have done so in vain, for they were in the exercise of power under Act of Parliament The loss may be greater to him than to others, but all who ever had TOME XXIII.

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easement in or over the part of street shut up suffer loss in a degree. Drummond has not ground of complaint differing, save in degree, from that which might be made by all the inhabitants of houses in the neighborhood of St. Felix street, even in other streets. Such injury as he complains of was never meant to be made subject of compensation. It appears that, in 1862, a new street or passage, prolongation of St. Felix street, was opened by the Corporation, from Bonaventure street, north-westwardly, up to St. Antoine street, and that Drummond's property upon Bonaventure and St. Felix street was taxed towards the improvement \$103. By reason of this, I believe some members of the Court would give him gain de cause; but I cannot see upon what sound principle. The Legislature has not made proviso, or exception, and it is not for Courts to make them. Because he was taxed formerly for St. Felix street, north-west of Bonaventure street, the Corporation must pay damages to him for shutting up part of St. Felix street, south-east of Bonaventure street. I cannot agree to this. There can be no particular virtue in the \$103, I take I suppose no special potency is in the amount. Suppose he had been taxed a mere \$5, his claim for damages would be as good as the majority of the Court sees it here, in the case of the \$103; but it is impossible for me to hold that the mere fact of having been so taxed can give right of action for damages. If he have such an action, each other person who was taxed has a right of action. The street that he was taxed for is as open as ever it was. I do not see more right of action in him, in consequence of having been taxed for new St. Felix street, than would be from his having been taxed for a street, a block further off. Finally, his declaration does not found upon that payment of \$103, though, parenthetically, as it were, it is mentioned. The proposition, in his factum, is not based upon such payment. I am of opinion that the Corporation appeal ought to be maintained.

TORRANCE, J., also dissentiens, would merely say that he concurred in the reason given by Mr Justice MACKAY for differing from the judgment of the majority of the Court.

TASCHERAU, J.: Il est indubitable que, d'après l'acte d'incorporation de la cité de Montréal, les appelants, défendeurs en Cour Inférieure, avaient le droit de fermer cette rue St-Félix, de le faire disparaître même en entier, ou en partie, et ce dans l'intérêt général, du public ou de la localité. Mais aussi il faut admettre que le demandeur qui avait, sur la foi publique, construit sur cette rue St-Félix, un nombre de maisons dont il pouvait espérer retirer un revenu rémunératoire, avait aussi le droit d'espérer une indemnité des dommages que lui causerait la fermeture de cette rue ordonnée, j'imagine, non par un

suffer loss in aint differing, by all the in-. Felix street, plains of was on. It appears on of St. Felix Bonaventure reet, and that St. Felix street eason of this, I him gain de rinciple. The , and it is not axed formerly street, the Corg up part of St. I cannot agree he \$103, I take ount. Suppose nages would be ere, in the case d that the mere of action for her person who at he was taxed more right of taxed for new ing been taxed eclaration does parenthetically, n his factum, is n that the Cor-

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Mais aussi il la foi publique, maisons dont oire, avait aussi que lui causeine, non par un

pur caprice de la corporation, mais dans un but d'intérêt ou avantage public. Il pouvait espérer n'être pas le seul dans cette localité qui n'en profiterait pas; il pouvait encore plus espérer n'être pas le seul qui souffrirait de ce changement fait dans l'intérêt public. Or, c'est cependant le contraire qui a eu lieu vis-à-vis du demandeur. Il est prouvé que ce changement ou fermeture de la rue St-Félix lui a causé un dommage assez considérable dont nous parlerons dans un instant, et la question principale soulevée en la cause est celle de savoir si lui seul peut supporter le dommage causé par cet acte des défendeurs. La question est controversée, et n'est pas exempte de difficultés, j'avoue. Les défendeurs ont prétendu qu'en fermant "cette rue St-Félix, ils n'avaient commis ni violence, ni " illégalité, ni voie de fait; qu'ils n'avaient qu'exercé un droit, " un privilège qui leur était conféré par la charte d'incorpo-"ration de la cité; que n'ayant pas empiété sur la propriété " même du demandeur, ils ne pouvaient être poursuivis en "dommage." Le droit de fermer ou supprimer la rue St-Félix indubitablement appartenait aux défendeurs, aussi bien que celui d'exproprier le demandeur du terrain même de ses maisons. Les défendeurs, sans aucun doute, ne pouvaient exproprier le demandeur de la plus minime partie de sa propriété sans l'indemniser. Dans le cas présent, on ne lui ôte pas un pouce de sa propriété, mais on fait plus, on ferme une rue sur laquelle il a bâti ses maisons, et on le prive ainsi d'une grande partie de la valeur de sa propriété. Peut-on dire qu'en ce cas, il n'y a pas expropriation de partie de son domaine. La cité de Montréal, en permettant l'ouverture de cette rue, a invité non seulement tous ses contribuables, mais tout le monde à bâtir sur cette rue, dans des vues de spéculation, ou autres, et en en decrétant la fermeture, sans indemnité, elle manque à la bonne foi, à la promesse implicite qu'elle a faite de tenir cette rue ouverte, ou, si elle se déterminait à la fermer, elle s'oblige à en indemniser les intéressés qui s'y sont bâtis sur la foi de cette promesse. Les autorités contraires aux prétentions du demandeur semblent ne pas manquer, je l'avoue, mais ces autorités sont plutôt l'expression d'un droit différent de celui qui doit régir cette matière en ce pays, et n'envisagent pas comme violation du droit de propriété le fait de la suppression d'une rue. L'ancien droit français, et surtout le nouveau droit français me semblent à peu près unanimes en faveur du demandeur, et consacrent cette maxime. En effet, quelle différence y a-t-il entre enlever à un homme la moitié de sa propriété, et lui enlever la moitié du revenu annuel de cette même propriété? C'est à mon sens dans l'un ou l'autre cas une expropriation donnant droit à une indemnité. Ce mode d'expropriation est, sous un point de vue, plus fatal ou

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plus désavantageux au propriétaire que celui d'une expropriation réelle du terrain, en ce que ce premier mode le laisse avec une propriété isolée et dépréciée, et dont l'entretien et assurance annuels seront aussi considérables que si l'expropriation n'avait pas eu lieu, et ce sans avoir les chances d'un revenu proportionnel. L'article 407 du Code Civil canadien, qui exprime l'ancien droit sur la question, n'est que la reproduction verbatim de l'article 545 du Code Napoléon, et est concu en ces termes: "Nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnité." Avec un texte de loi identique, il est intéressant de savoir comment les commentateurs du Code Napoléon interprètent cet article, et s'ils en limitent l'application au seul cas où l'expropriation est de l'immeuble en entier, ou en partie, ou bien si le fait de construction d'ouvrages publics, d'une suppression de rue, ou autre chose de nature à diminuer la valeur de la propriété elle-même, est ou n'est pas considéré comme équivalant à une expropriation de facto, et donnant droit à une indemnité en faveur du propriétaire. Les nombreuses autorités citées au factum du demandeur, comme tirées du Droit français, établissent, à ma satisfaction, son droit à une indemnité. J'y adjoindrais les autorités suivantes, savoir: 1° Larombière, vol. 9, page 511, nos 566, 567, exprimant l'opinion que l'abaissement ou l'exhaussement du sol, résultant de travaux exécutés sur la voie publique, et au moyen desquels la maison d'une personne se trouve déchaussée, ou enfoncée, donne ouverture à une demande en indemnité, et il exprime que ce dommage qui s'attaque au droit de jouir constitue une véritable expropriation. 2º Proudhon, Domaine public, vol. 1, page 169, où il exprime l'opinion que, "si une administration prescrit quelques travaux ou établissements dont l'exécution entraîne une lésion dans la propriété ou les droits légitimement acquis à quelqu'un, celuici est fondé à prétendre que, ne devant souffrir le sacrifice de sa propriété pour cause d'utilité publique qu'à la charge d'une juste indemnité, il doit avoir la faculté de l'exiger, et de traduire cette administration devant les tribunaux compétents pour en décider." 3° Même opinion dans Proudhon, vol. 2, Domaine public, pp. 344-367 où il cite des arrêts de la Cour de Cassation, dont les considérants sont l'expression des idées philosophiques du plus haut intérêt, et affirme des principes d'équité que l'on ne peut perdre de vue ou vouloir ignorer, sans blesser les règles de droit qui veulent qu'un seul ne puisse être soumis à faire des sacrifices auxquels ses concitoyens qui en profitent ne contribueraient pas. Sourdat, dans son traité de la Responsabilité, vol. 1, nº 426, p. 466, commentant l'article 545 du Code Civil Napoléon, qui déclare que : " nul

me expropriale laisse avec etien et assu-'expropriation d'un revenu adien, qui exreproduction t est conçu en er sa propriété, oyennant une loi identique, mentateurs du ls en limitent de l'immeuble truction d'ouutre chose de e-même, est ou propriation de faveur du profactum du deblissent, à ma adjoindrais les . 9, page 511, ement ou l'extés sur la voie ne personne se ure à une demage qui s'atexpropriation. , où il exprime elques travaux lésion dans la relqu'un, celuile sacrifice de a charge d'une ger, et de traix compétents non, vol. 2, Dode la Cour de sion des idées des principes puloir ignorer, seul ne puisse es concitoyens dat, dans son B, commentant re que : " nul

ne peut être contraint de céder sa propriété, si ce n'est pour "cause d'atilité publique et moyennant une juste et préalable " indemnité," nous dit, que "dans un sens large, cette disposition s'entend de la privation de toute partie de la propriété, comme aussi de tout avantage inhérent à la jouissance, et qui vous est retiré par une sorte d'expropriation indirecte," et dans les nos suivants, il cite diverses décisions des tribunaux judiciaires, et, notamment de la Cour de Cassation, accordant des indemnités, dans des cas même où l'exhaussement ou l'abaissement d'une rue avaient été faits par ordre de l'administration, et il les approuve : cependant, au n° 428, il déclare que la suppression d'une route (il ne parle pas d'une rue) ne donne pas droit contre l'Etat à une réclamation en faveur des aubergistes et autres commerçants qui étaient venus s'établir sur ses limites; cette décision semble avoir été donnée par le Conseil d'Etat, et non par aucun tribunal judiciaire ordinaire. Le fait qu'il s'agissait, non d'une rue dans une ville, mais d'une de ces grandes routes qui sillonnent la France, sur un long parcours, appuyé de celui de la décision prononcée par le Conseil d'Etat, peut expliquer l'apparente contradiction entre les décisions de la Cour de Cassation et le Conseil d'Etat. Il me semble que si le simple abaissement ou exhaussement d'une rue a été déclaré, par maintes décisions de la Cour de Cassation, et autres tribunaux de la France, comme donnant droit à une indemnité pécuniaire, à fortiori, la suppression entière d'une rue doit-elle y donner lieu. Cependant, je remarque qu'à la page 471, nº 430, Sourdat dit que "le refus d'indemnité n'est que le résultat d'un étroit point de vue, et qu'en refusant, dans tous les cas, l'indemnité, on méconnaîtrait la véritable "nature des choses, et on fausserait les notions du droit qui "leur sont applicables. L'administration et les particuliers ne sont pas, l'un envers l'autre, dans le même état d'indépen-"dance que les particuliers entre eux. Les intérêts généraux dominent toujours les rapports qui les unissent. Ces intérêts "leur imposent des obligations corrélatives et réciproques. Ainsi, les propriétés riveraines d'une voie publique sont grevées de charges spéciales à raison du pavage, du balayage, de l'alignement. D'un autre côté, si la loi ne leur accorde positivement aucune servitude sur la voie publique, l'établis-" sement de celle-ci a créé pour elle des attentes respectables, " un état de choses que l'administration est engagée, jusqu'à un certain point, à maintenir. Il importe à la sécurité de la circulation et à l'embellissement de la ville que des constructions régulières, que des établissements utiles se forment le long de la voie publique. Il faut donc présenter aux constructeurs et aux propriétaires quelques garanties contre des événements qui viendraient ruiner toutes les espérances," &c. Et, à la page 474, n° 433, il déclare que, "dans le doute, la voie " la plus libérale est préférable; que la société a bien moins " à redouter de voir allouer, aux propriétaires, des indemnités "auxquelles ils pourraient ne pas avoir droit, que de voir " s'accréditer, par les exemples réitérés d'une rigueur exces-" sive, l'opinion que la propriété n'a aucune sauvegarde contre " les actes de l'administration, et ne doit attendre aucune "compensation du préjudice qu'elle lui cause assez souvent." Je déclare, en toute sincérité, que ces diverses opinions de Sourdat me semblent affirmer un droit et une équité que nous sommes justifiés à considérer comme loi en notre pays. Si donc la fermeture d'une rue cause des dommages à un individu, propriétaire d'une maison, et si, d'après les autorités du demandeur, cet acte peut être considéré comme une expropriation, les défendeurs étaient obligés, avant que d'avoir recours à un tel acte, d'adopter, vis-à-vis du demandeur, les procédures ordinaires prescrites par la charte d'incorporation de la cité de Montréal. Ils n'ont rien fait de semblable, mais se faisant justice à eux-mêmes, ils ferment la rue et causent le dommage. Cette conduite des défendeurs justifie l'allégation de la déclaration du demandeur que les défendeurs avaient, en fermant la rue, agi violemment, illégalement, et s'étaient rendus coupables d'une voie de fait, et sont passibles des dommages que le demandeur a pu souffrir. En ce cas, devons-nous renvoyer les parties à se pourvoir en la manière et forme pourvues par le statut d'expropriation, ou devons-nous condamner les défendeurs aux dommages résultant de leur acte illégal? Dans le délibéré, cette question s'est élevée dans mon esprit, mais j'en suis venu à la conclusion que les parties s'étant toutes deux soumises à la juridiction du tribunal, ayant nommé des experts, ces experts ayant fait rapport, et la sentence du tribunal donnant gain de cause au demandeur, pour une somme dont le montant était l'expression de l'évaluation d'au moins deux de ces experts, et considérant l'acte des défendeurs au point de vue de voie de fait, je suis venu à la conclusion de dire que cette Cour avait juridiction en la matière, tout de même que si les défendeurs, sans observer aucune des formalités de l'acte d'expropriation, avaient jugé à propos de détruire, en tout ou en partie, la propriété, ou de s'en emparer. Passant maintenant au chiffre des dommages accordés au demandeur, je dirai que ce dernier les trouve excessivement minimes, et s'en plaint, par son appel, tandis que les défendeurs s'en plaignent comme exorbitants. La preuve étant assez contradictoire sous ce rapport, le tribunal de première instance a référé la question du montant de ces dommages à trois experts qui ont différé entre eux, quant au chiffre des dommages, mais se sont tous accordés à dire que le demandeur

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avait éprouvé des dommages, que l'un des experts estime à \$4,000, l'autre à \$2,000 et le troisième à trois mille piastres. Le juge qui était chargé de la cause, ayant devant lui toute la preuve testimoniale et l'opinion des trois experts, a cru devoir prendre pour base de son jugement l'opinion des trois experts, avec un terme moyen qu'il a établi à \$3,000. Je ne crois pas ce chiffre exagéré; je le crois au contraire juste et conforme à la preuve testimoniale et à l'opinion des experts. En conséquence je suis disposé à confirmer le jugement de M. le juge BEAUDRY avec dépens contre les appelants, et à renvoyer l'appel et contre-appel avec dépens contre chacun des appelants

respectivement.

RAMSAY, J.: The question raised in this case is as to whether the Corporation of the city of Montreal can close a street, without being liable for the special damage incurred by a proprietor, owing to this act. It is not possible to place the question more frankly than it has been by the learned Counsel for the appellants. He says that, in the Act of Parliament, passed in 1860 (23 Vic., c. 72, sect. 10, ss. 6) authorizing the Corporation "to regulate, clean, repair, alter, widen, contract, straighten or discontinue the streets in the said city," there is no clause saying they shall give indemnity for anything done under this Act, and that, consequently, they are not liable for any damage special or otherwise suffered by any individual. If any one suffers damage, it is damnum absque injurià. The Corporation is only using the powers conferred on it by law. Qui de jure suo utitur, damnum non facit. The appellants then go on to cite a dictum of Lord Kenyon, in the case of the Governor of the British Cast Plate Company and Meredith et al., (4 T. R., p. 796), to establish the doctrine that, what a Statute allows is law, and that, if no condition is expressed in the law, none can be added. In a word, it is not wrongful, because it is authorized by the Legislature. In support of this proposition, other cases have been cited, and many cases are to be found, amongst the English Reports, bearing on the matter. These cases seem to form two classes, one in which the damages result consequentially from the performance of some act authorized by the Legislature; the other, in which the damages result from the manner in which an act lawful in itself is performed. There will be no great hesitation in accepting the general rule supported by these cases; but they do not appear to me to apply in the present case. These cases were all Acts permitting a special thing to be done; the Act allowing the Corporation of Montreal to discontinue streets is a general Act amending the various Acts of incorporation of the city. That Act must therefore be read with these Acts, and compensa-

tion is at the root of them all. The power to injure without compensation must be express, it cannot be presumed. If we were to adopt the appellants' doctrine, we should have to say that they could not alter the level of a street without componsation, but that they could abolish it without compensation. By the expropriation clauses too, it would be possible for them to tax a proprietor for the consequential advantage of opening a street in his neighborhood, put his money in their pocket, and close the street the next day without indemnity. Curious to say, this is not a fancy illustration. Not long ago, the respondent was taxed for the opening of the division of St. Felix street, in which division he has no property, and they close up the division of St. Felix street in which his property actually stands now, and they tell him he has no right to indemnity. All this is proved in the record. It is St. Felix street to-day, but it might be Notre-Dame street to-morrow. But appellants have no faith in their own pretensions. On the faith of the report of one of their committees, appellants have actually paid the proprietors in the division of St. Felix street, above where respondent's property is and to the cost of opening which he contributed; but they decline to indemnify the greatest sufferer. This is not fair dealing on the part of a great public Corporation. The excuse given for closing the street was that the Grand Trunk made up their trains across it, and that it would be dangerous to the public to leave it open. But the Grand Trunk had no right to make up their trains across the street, and there was no reason why the plaintiff should be injured on that account. With regard to the Boston case (Smith v. The City of Boston, 7 Cushing), what did Chief Justice Shaw say? He said the damage complained of was the same sort of damage as other people sustained, and the plaintiff had another outlet. inference was that, if there had been no outlet, Chief Justice Shaw would have given judgment the other way. The case is therefore against appellants' pretensions. There can be no objection to the amount of damage awarded. It does not go beyond the evidence, and it is a fair way of dealing with the report of the experts.

Sanborn, J.: It is of some importance to observe that plaintiff built his houses upon this street, in 1854, long before any power was conferred upon the city Corporation to discontinue existing streets, the power to do this being given by Prov. Stat., 23 Vic., c. 72, s. 10, sub. s. 6 (in 1860). It is also to be borne in mind that the alleged necessity for discontinuing a portion of St. Felix street, viz., public safety, by reason of the railway track of the Grand Trunk Railway crossing it, near its station, rendering it unsafe to keep the street

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o observe that 54, long before oration to disbeing given by 860). It is also by for discontisafety, by rea-Railway croskeep the street

open, did not exist when plaintiff built his houses there, because the railway station was originally outside of the city and it was brought to the vicinity of St. Felix street at the sollicitation of the city authorities, and an agreement was entered into, between the city authorities and the Railway Company, that a portion of this street should be discontinued and given over to the Railway company for the purposes of their station. It is also to be remarked that about the year 1862, a prolongation of St. Felix street was made, so as to terminate in St. Antoine street and, to accomplish this, a special tax of \$103.73 was exacted of Drummond, which was not levied proportionally upon the citizens generally, but only upon property holders in St. Felix street. The authorities cited by the parties, from French authors, and civil law writers generally, are very conflicting as to the right to recover indemnity, for loss in deterioration of the value of property, by reason of the exercise of powers conferred by law, in the interest of the public, when no actual property is taken, and the loser is not deprived of access to his property, but the access is rendered more difficult. The general rule, under English and American law, following the leading case, The Governor of the British Plate Manufacturing Co. vs Meredith et al., is, that, where a person so suffers loss, in common with the other inhabitants of the city, the loss differing only in degree, it is damnum absque injuria, and no indemnity can be recovered. Justice Buller, however, remarks, in that case, that the civil law is more favorable to the claimant, in such case, than the common law. The case of Smith vs. the City of Boston, referred to by Mr Justice MACKAY, is in some respect very similar to this. Even in that case, the judge guards himself against making the principle absolute in all cases, and seems to admit that a case might arise where indemnity might properly be awarded. As an abstract principle, it is acknowledged by all writers, under both systems of law, that, when a person is deprived of his property for the good of the public he is entitled to be indemnified for it, and the reason given why he shall not have it, when he only suffers a loss in common with the general public, though his loss may be much greater than that of many others, is that it would give rise to a multiplicity of actions, and would render municipal government a failure. The deterioration of the value of property, by changes in the grading of a street, or the using of the street for a railway track, or establishing other servitudes upon it, for the common advantage, so long as its character as highway is retained, is a very different thing from closing it up, and diverting it from its original purpose altogether. The case of the Governor &c. vs Meredith et al. decides nothing upon

this state of facts. In this case, the fact that a special tax was laid upon Drummond, for the opening of this street, recognizes that he has an interest in it, not shared by the inhabitants or the citizens generally. If so, the converse is true, and being deprived of it, he suffers a loss not shared by the citizens generally. The street was closed up without notice to him, and without any attempt to conciliate him. The loss he sustains is real and considerable. It appears, by documents of record, that, by a report of the Committee of the City Council. approved by them, they declared that property holders on this street have sustained loss, by the closing of it, and a certain compensation is recommended. This does not preclude them from testing the legal rights of plaintiff, because admission against persons acting jure civitatis are not to have the same effect as when parties act in their own right, but it cannot be regarded as destitute of significance as evincing their appreciation of the justice of the case. The majority of the Court, without impugning the authorities cited, or denying the doctrine laid down in the English and American cases, as applied to the facts presented in such cases, are of opinion that the damages suffered by Drummond, in this case, are exceptional and direct, and differing, not simply in degree, but in kind, from those of the inhabitants generally, from the closing of this street, and that he is entitled to indemnity therefore. And we consider the estimation of his loss, by experts or viewers, instead of taking the opinion of witnesses, was the correct and legal mode, and, if these experts have taken into consideration that, as respects a portion of this loss, he should share it in common with the rest of the rate-payers, we do not think in this they erred. The judgment as a whole is confirmed, with costs against the Corporation in the Court below, and upon their appeal in this Court, and with costs against Drummond upon rejection of his appeal in this Court.

M. WILLS, Q. C., and M. GIBBS, for the Appellants. M. Bompas, and M. K DIGBY, for the Respondent.

M. Wills, Q. C., for the Appellants: The corporation of the city of Montreal, in regard to the act complained of by the Respondent, exercised and did not exceed the powers rested in it by the provincial Act (23 Vict., c. 72), and the other enactments and by-laws under which they had power to discontinue streets. The corporation was not bound, before closing St. Felix street, to offer to pay back to the Respondent the special tax paid by him to the corporation of the city of Montreal in 1862, in respect of the extension then made of the street. The respondent, moreover, did not suffer any special damage from the discontinuance of the street differing in kind or degree from that suffered by the general

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public. In no case could this action, which is in form for a wrong, be maintained; if the Respondent had any right at all, which is denied, it could only be by way of compensation and not by way of action. In fact, the Respondent was only presented by the discontinuance of this street from doing that which he had no business to do. He referred to a book of rules and regulations of the Grand Trunk Railway of Canada according to which strangers were peremptorily forbidden to trespass on the company's line or on the lines worked by the company: Railways Clauses Act Canada, Consol. Stat., 22 Vict., c. 66, s. 18. With regard to the powers under which the corporation acted in closing the street, see provincial Act 14 & 15 Viet., c. 128, ss. 58 and 64; 23 Viet., c. 72, s. 10, sub. s. 6; the Council's by-law of the 11th of September, 1866, and 27 & 28 Vict., c. 60, ss. 7, 11, 13, 15 and 18. These sections provide for the necessary expropriation and special assessment consequent upon the corporation resolving upon any improvements which necessitate the acquisition of real property and also for the appointment of commissioners to determine the price or compensation to be paid for the same and for the homologation of the report containing its appraisement by the Superior Court. It is clear, therefore, that any claim which the Respondent may have would, inasmuch as the corporation acted strictly under its statutory powers, fail to be determined by the commissioners under the last-named Act. The claim which he has instituted for damages assumes that the act complained of was unlawful and wrongful, and therefore, the objection to the form of action and procedure adopted is one of substance and not of form, and raises, in fact, the question of jurisdiction, on the part of the tribunal to which he resorted. Jones vs Stanstead Railway Company. (1) It is contended for the Appellant corporation that it had the power to close this street without granting any compensation at all to the Respon-When a statute authorizes a thing to be done, and does not expressly authorize compensation for the same, then the doing of the thing authorized is damnum absque injurid, and the Plaintiff is without a remedy. See Governor and Company of British Cast Plate Manufacturers vs Meredith and others (2), which is the oldest case on the subject, and Dungey vs Mayor &c., of London (3), which is the most recent. He referred also to Ferrar vs Commissioners of

⁽¹⁾ Law Rep., 4 P. C., 98, 120, and 23 R. J. R. Q., p. 51.

^{(2) 4} Durnford & East Rep., 794.

^{(3) 38} L. J. (C. P.), 298.

Sewers in the City of London (1) [Sir Montague E. Smith: We have no general law or general principle by which compensation is given in such cases; it is entirely statutory. I It is strong to shew that there is no general legal right to compensation, that it is expressly provided for in so many particular cases. No statutory compensation is provided in this case. and we say, therefore: none at all can be claimed. The Respondent relies on sect. 407 of the Civil Code of Lower Canada that " no one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid:" and contends that this provision is in accordance with the old French law, which is said by him to have required persons who, in the execution of works of public utility, injured the property of others, to make compensation to them. It is contended for the Appellant that a destruction of a right of the kind which is the subject of this action never was inclu led under the old French law of expropriation. Sect. 407 of the Civil Code is taken bodily from sec. 545 of the Code Napoléon. He referred to sects. 544, 545, and 546 of the latter Code to shew that the ownership there referred to was limited to the ownership of corporal rights; to Demolombe, vol. IX, art. 540, as to sense of the word "Propriété;" art. 559, whether it is susceptible of expropriation on the ground of public utility; art. 565, a reenactment of the common law of France. See the French statute of the 3rd of May, 1841, referred to in that article. Also to a French statute of the 16th of September, 1807, on the same subject. These and similar French statutes do not provide compensation in similar circumstances to the present. They bear out Demolombe's rule as to expropriation; and, accordingly, the damage alleged in this case does not fall under the head of expropriation, nor can any title to indemnity arise under Art. 407. He referred also to statutes of the 21st of May, 1836, as to road making. (These statutes are to be found in the Appendix to Royer-Collard's Codes français.) There is no French statute which he had been able to find which gives compensation in such cases as this. He referred to Demolombe, vol. XII, art. 699, and to art. 700, upon the question whether the right in this case would be one of action or of compensation. He referred to Husson (1851), Législation des Travaux Pub., p. 329; Lurombière, vol. IX, p. 511, nº 566-7; Proudhon, Domaine Public, vol. I, p. 169, vol. II, pp. 344, 567; Sourdat, Traité de la Responsabilité, vol. I, p. 427, nº 326; Smith vs City of Boston (2). The intention of the Legislature was to remove

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^{(2) 7} Cush., 254, Massachusetts Cases.

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cases of this kind from the ground which under the current of the old French authorities, was a debateable one; and to prescribe the cases, and the only cases, in which indemnity should be payable. Then as to the damages claimed, there is none whatever under English law : see Kicket vs Metropolitan Railway Company (1). If the case is not within 27 & 28 Vict., c. 60, s. 18, no compensation can be claimed at all: if it is within that section, it is so for all purposes, and the compensation must be awarded by the commissioners, and not

by the Court, in an action of this nature.

M. GIBBS, on the same side:—The liability of this corporation (which is itself a creature of statute law, since although originally created by royal prerogative, it was made the subject of enactment by the Legislatures established under Imperial Statutes 3 & 4 Vict., c. 35) to pay damage in respect of its legally authorized acts must be ascertained from the express provisions of statute. [He referred to 14 & 15 Vict., c. 128; 23 Vict., c. 72; and 27 & 28 Vict., c. 60; and to the Civil Code of Canada, Art. 362.] Then as to the applicability of Art. 407 of the Code. The Respondent is not deprived of his property within the meaning of that article. [Sir Montague E. Smith :- No, but the principle there laid down applies to certain classes of damage. M. Bompas:-There are numerous cases decided by the Court of Cassation to shew that this case of damage to property is included.] Those cases ceased at a certain time; and the Respondent here is deprived of that which is a servitude under sec. 381 of the Civil Code, as to which see Art. 1589 of the same Code. The distinction is between expropriation, antecedently to which there must be a just indemnity paid, and damage, which is either damnum sine injurid, or to be compensated for under the special provisions of 27 & 28 Vict., c. 60. As to expropriation see the law of the 3rd of May, 1841, in the Appendix to Codes français; and for the nature of property, see art. 545 of Code Napoléon; and for procedure, compare Dufour, Droit Administratif, vol. V, p. 368, with 27 & 28 Vict., c. 60. Although in cases of expropriation recourse was had to the Courts of law, in cases of damage it was to the administrative tribunal, the councils of prefecture, which acted under the law of the 17th of February 1800: see Arts 1382-3 of the French Code. It is now settled that every case of this nature, except the expropriation of land, belongs to the jurisdiction of the councils of prefecture. The result of the authorities, at least, is that this is not a case of expropriation: see Zachariae, Droit Civil français, tom. II, sect. 277; Sirey (1852), part II, p. 91. The

⁽¹⁾ Law Rep., 2 H. L., 175.

Respondent in this case has suffered no damage in respect of which he is entitled to any compensation: see Dufour, Droit Administratif appliqué, sect. 233; Dufour, Exprop., p. 275, n° 265; Metropolitan Board of Works vs McCarthy (1); Iveson vs Moore (2), cited in Ricket's Case; Beckett vs Mid-

land Railway Company (3).

M. Bompas, for the Respondent: The question is whether under the statutes the corporation can shut up streets without giving compensation to those injuriously affected thereby, or whether under the general law of Canada compensation is The Respondent has been compelled to give up his property, within the meaning of Art. 407 of the Code, and the appellants were bound, therefore, as an antecedent condition, to indemnify the Plaintiff. The Canadian Code expresses and does not abrogate the common law of France upon this subject; and in France where the laws express the will of the king and not of the people, it was a maxim of the common law that the king could not take private property without compensation. See Isambert, Anciennes Lois françaises, vol. VII, p. 144; Ordonnance de Charles VI, Paris, avril 1407. Consequently the old French statutes do not as the English statutes contain express clauses of compensation. If the king gave a corporation the right to take property for purposes of utility, the common law gave the individual a right to compensation. This right remains unless it is expressly taken away by a Canadian statute. See Dupeyronny et Delamarre, p. 7, sect. 10; Dalloz, Jurisprudence Générale, tit. "Expropriation pour utilité," sects. 5 and 6; Sirey, vol. XXV, pt. 1, pp. 297, 301, where a question arose as to compensation for rights of fishery. A servitude is such a right as gives you a title to indemnity under Art. 545 if you are deprived of it whether it is called servitude or quasi-servitude. A right of passage throughout the entire street belongs to the owner of every house in it as such a servitude within the meaning of the French law. [He referred to Proudhon, Traité du Domaine Public, vol. 1, p. 509, n° 369, 372, 374; vol. II, p. 343, Art. 570, and p. 346; Curasson, nº 32, p. 208; Pardessus, Traité des servitudes, vol. 1, p. 96, n° 40; Demolombe, vol. XII, arts. 699, 700, 701.] [Sir Barnes Peacock :- Could the corporation stop up the road, giving compensation to those who had houses on either side, without incurring any liability under Freach law to others

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⁽¹⁾ J.w Rep., 7 H. L., 24%.

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not having servitudes who might nevertheless sustain special damage ?]. Art. 545 of the French Code includes within its scope all who have real rights, which probably would not include those who had no houses on either side. For French cases, see Sirey, vol. XXVI, pt. 1, p. 267; Town of Nuntes v. Bienassy, pt. II, p. 196; Sirey, vol. XXIX, pt. 1, p. 164. With regard to the Canadian statutes, some of them expressly give compensation in all cases in which they give power to take property for public utility; others, including 23 Vict., c. 72, do not provide for compensation in any case. They do not expressly or impliedly take away the right to compensation; there is nothing in them inconsistent with that right which the common law undoubtedly gives. He referred to 36 Geo. 3. c. 9, s. 44; 3 & 4 Vict., c. 36, s. 43; 4 Vict., c. 22, ss. 18, 27; 8 Vict., c. 59, ss. 48, 59, 63; 15 and 16 Vict., c. 128; 23 Vict., c. 72, ss. 10, 51. The English cases are clear that if an Act gives power to do a particular act without saying any thing about compensation, then if injury results from such act, no claim arises for compensation. If on the other hand, the Legislature says you may make by-laws to stop up a street, that means you may make by-laws for that purpose consistently with the rights of third parties. It does not delegate a power to be exercised irrespective of the rights of others. Here the only power given by statute to the corporation is to make by-laws. Stopping up a street does not necessarily interfere with rights of third parties; it may be stopped subject to those rights (if any) being preserved or compensated for. Moreover the by-laws were passed subject to the general law as laid down in Art. 407 of the Code. Otherwise the by-law made by the Appellants for the closing up of St. Felix street without a previous payment of compensation to persons whose property was taken away or injured was illegal and void. He referred to Attorney-General vs Colney Hatch Lunatic Asylum (1), where the earlier cases are cited. See 27 and 28 Vict., c. 60, s. 18. The rules of French law on this subject are similar to the rules of English law as laid down in Metropolitan Board of Works vs McCarthy (2). He referred to three decisions by the Court of Cassation in which Art. 545 of Code Napoléon, which is identical with Art 407 of the Canada Code, was relied upon as giving a right to compensation: Sirey, vol. 36, pt. 1, p. 601; vol. 38, pt. 1, p. 455; vol. 42, pt. 1, p. 594. He referred also to Johnson vs Archambault (3). The

⁽¹⁾ Law Rep., 4 Ch., at p. 146.

⁽²⁾ Law Pep., 7 H. L., 243.

^{(3) 8} Law Can, Jur., 317, and 19 R. J. R. Q., 589.

result of common law and statute law is to introduce into Canadian law the same rules as to compensation as were laid down in *McCarthy's Case*. As to the form of the action, he referred to 37 Vict., c. 51, s. 176, ss. 21, and the Code of Civil

Procedure, sect. 144.

Mr Digby on the same side:—The doctrine that a right of property cannot be taken away without compensation is a principle of French common law; the foundation of it is in the Digest, lib. 43, tit. 8, ch. 3. According to French law. the right of using this street is regarded as a right of property attached to the houses abutting on the street. The French writers do not make any distinction between rights of passing and rights of ingress and egress, &c. They style such rights servitudes or quasi-servitudes: see Curasson, p. 208, no 32; Solon, Servitudes réelles, nos 411, 412, 416; Toullier, vo'. III. nºs 480, 481; Husson, p. 530; Delalleau, Traité de l'Expropriation, p. 86; Dufour, Histoire du Droit Administratif, vol. V, p. 322. As to the meaning of the word "property, see Austain's Jurisprudence, vol. II, [3rd ed.] pp. 818, 819. Then, assuming that we have such a right as if interfered with in a substantial way would give a claim to compensation, has such damage been in fact sustained? The action is brought on account of the suppression of the street. The damages are sufficiently direct and substantial; there is a permanent depreciation of the value of respondent's property in the way of loss of rents, for the houses cannot be let, or are let to indifferent tenants. In this respect the case is distinguishable from the French cases cited on the other side, which were cases of temporary damage. He cited Daubanton, Voirie, p. 238, art. 193, where the distinction between temporary and permanent damage is insisted upon. The former is held to be compensated for by the ultimate advantage accruing from the works complained of. As to the Respondent's remedy, under French and Canadian law the proper remedy is by common law action, and it is submitted that the same is not taken away by the statutes affecting the corporation of Montreal. The Respondent has been deprived of property within the meaning of sect. 407 of the Code, and unless the previous indemnity has been paid, his right to that property or its equivalent remains, and can be enforced by action. In Jones vs Stanstead Ry. Co. (1), the Plaintiff asked for the demolition of a duly authorized work, and not for an indemnity Though the work is not illegal the right to the indemnity remains, unless it has been extinguished by a previous payment. Thus the doctrine based upon English statutes, that

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the right of action is taken away and turned into a statutory right of compensation does not apply. The right is not to ask that the obstruction be removed, but to ask for the findemnity. He referred to Sirey, vol. XLII, part 1, p. 594, and vol. XXVI, p. 196. Actions for indemnity are based upon Art. 545 and 1398 of Code Napoléon, Arts. 407 and 1053 of the Canada Code. The title to compensation here does not rest upon 27 and 28 Vict., c. 60, s. 18, but on principles of common law, which are outside the statute, and are not affected by it. It requires the clearest and most unambiguous terms to justify the construction that a common law right is taken away by statute: see Sidywick's Statutory Law, p. 310. This point was never taken at all in the Courts below, either in the pleadings or in argument. He referred to Code of Civil Procedure, Art. 322 and Art. 21. The Respondent is within the principle of this latter article, and has a right which is not taken away by statute. Sect. 18 of 27 and 28 Vict., c. 60, is an enabling section, and does not bind or limit him in any

way.

MR WILLS, Q. C., replied: The Respondent has attempted to import into the law of Canada French statutes and law, which, so far as they are subsequent to 1763, have no application in Canada. It is an entire misrepresentation to say that before the Revolution it was a maxim of French common law that compensation was always due in cases where property was taken for public utility. Before the Revolution there was every abuse of seigniorial and other feudal rights; at the time of the Revolution were enacted those violent laws which destroyed the rights of the old feudal aristocracy without compensation. Reverence for the rights of property grew up subsequent to that date; and the Acts of 1807 and 1810, which have been referred to, are now the law of France. There is not a word to be found in the writers on the common law of France as to this alleged right of compensation. There is a series of edicts relating thereto from the time of Philippe le Bel to be found in the first pages of Delulleau's work; he referred especially to vol. I, pp. 7-12, and to an edict of 1705. The terms of compensation vary considerably in the different edicts. He referred to Dalloz's Repertoire, tit. " Expropriation." The French Code dealt with a state of law which did not recognize an invariable right to compensation. He referred to Delalleau in reference to the conflict between the two sets of French Courts on the subject of expropiration and indemnity; and to the laws of 1807, 1810, 1841, 1852, mentioned therein, in reference to the claim of the Prefecture Courts to cognizance of cases of expropriation. A new Court was established in 1843 to deal with the subject, and it deci-

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ded that the amount of damage belonged to the administrative bodies, whilst cases of expropriation belonged to the judicial authority. According to Delalleau, the old French law of compensation was purely administrative, and on the cession of Canada the administrative law of France was not such as could have been or was introduced: see Abbott vs Fraser (1). After 13 and 14 Geo. 3, s. 8, Canada was subject to legislative decrees; and in the whole series of forty years. statutes, from 31 Geo. 3, to end of Geo. 4, there are forty-five Acts for general and special purposes, involving cession of property, ten relating to roads, twenty-five to bridges, four or five to canals, some to harbours, one to lighthouses, and two to railways, and one to a board of works. Every single Act has its own clauses of compensation, and differs as much as the old French edicts in regard to it, and the method of providing it. The one solitary Act which stops up a particular street without compensation relates to Montreal, and is 57 Geo. 3, c. 22; 4 Vict., c. 4, established municipal councils; there was no provision for compensation; but the by-laws which it authorized have no validity until they have been approved by the Governor-General in Council. As regards the power of the corporation of Montreal, in reference especially to road making, he referred to 27 and 28 Vict., c. 60, s. 18; 36 Geo. 3, c. 9, sect. 38, 39, 40; 3 and 4 Vict., c. 36, s. 43; 4 Vict., c. 32, s. 18; 8 Vict., c. 59, ss. 52, 53; the subsequent Acts down to 27 and 28 Vict. did not introduce any material change, except that the Act of 1860 authorized by-laws. In 1866 came the Code with its 407th Article; in reference to which he referred to Demolombe, vol. IX, Arts. 540, 545, 567; Delalleau, vol. I, pp. 88, 92, 209, 210; Dufour, tit. "Expropriation," arts. 2, 3. The preliminary indemnity spoken of in Art. 545 of the French Code, and Art. 407 of the Canada Code, is inapplicable in cases of mere damage, which cannot be ascertained before-The modern legislation, under which cases of expropriation are placed under judicial cognizance, provides a statutory exception to the general rule, which refers cases of a similar nature to the administrative Courts. It is impossible to suppose that under Art. 407 of Canada Code, in every case in which special provision had been made for compensation under previous Canadian legislation, the hand of the surveyor or other officer should be stayed until "previous indemnity" had been paid. He then referred to a consolidation Act, passed in 1874, in reference to Montreal, viz. 37 Vict., c. 51, s. 123, sub-s. 27, which gave power to make by-laws. [Sir Barnes Peacock: The statute does not say you may stop up a street,

⁽¹⁾ Law Rep., 6 P. C., 120, and 21 R. J. R. Q., 526 and 563.

ie administraelonged to the he old French e, and on the rance was not see Abbott vs ta was subject of forty years, are forty-five ving cession of oridges, four or ouses, and two ery single Act ers as much as method of proup a particular treal, and is 57 councils; there by-laws which been approved rds the power of ally to road ma-; 36 Geo. 3, c. 9, et., c. 32, s. 18; 8 wn to 27 and 28 except that the e the Code with referred to Deu, vol. I, pp. 88, arts. 2, 3. The 5 of the French s inapplicable in rtained beforecases of exproprovides a starefers cases of a It is impossible le, in every case or compensation of the surveyor ious indemnity" dation Act, pasict., c. 51, s. 123, but that you may make by-laws. That is a term of art, and means reasonable by-laws : see Comyns' Digest, "By-law," C.; and is it reasonable to expropriate without compensation?] That depends on the circumstances of each case; whether direct and material damage has been incurred. He referred to Dalloz, Juris. Générale, vol. XLII, pt. 2, tit. "Travaux Publics," ss. 816, 821, and case in note to p. 821; Dalloz Recueil, vol. LVI, pt. 3, p. 61; vol. LIX, pt. 3, p. 45; vol. LX, pt. 3, p. 2; Dufour, on Expropriation, p. 279; Demolombe, vol. XII, n° 699, p. 198.

The judgment of their Lordships was delivered by Sir

Montague E. Smith:

The action which gives occasion to this appeal was brought by the Honorable Lewis Drummond (the respondent) against the Municipal Corporation of the City of Montreal (the appellants), for damage sustained in consequence of the Corporation having closed one end of St. Felix street in Montreal, The declaration alleged that the plaintiff had built eight houses fronting St. Felix street, which, at one end, opened into Bonaventure street, and, at the other, into St. Joseph street, and that these houses, being in immediate proximity to the Bonaventure Station of the Grand Trunk Railway Company, had acquired great value as boarding houses and shops. It then alleged that the Corporation, "without any previous notice to the plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, et par voie de fait, closed up St. Felix street, and built from the south end of his houses to the opposite side of the street a close wooden fence, about fifteen feet in height; May, in consequence, the street had "become a cul-de-sac, and the occupants of the houses had lost their natural means of egress and ingress." It also alleged that the occupant of one of the houses had abandoned it in consequence of the destruction of his business. The pleas of the Corporation (written in French) alleged that, in closing the street they had not committed "un acte de violence ou illégalité ou une voie de fait;" that they had only exercised a privilege and used a power conferred upon them by their charter of incorporation, "et qu'en exercant ce privilège ils n'ont pas empiété sur la propriété du demandeur;" that, in the several Acts of Incorporation of the city, the Legislature had specially designated the cases in which they were liable to indemnify individuals, for the damages resulting from the exercise of their powers, that is to say: "1, l'expropriation forcée; 2, le changement de site des marchés; 3, le changement de niveau des trottoirs;" and that whilst, acting within the limits of their powers, they were not responsible for damage. The pleas then state that

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the street "n'a pas été obstruée en fuce des maisons ou de la propriété du demandeur, et ses locutaires ont actuellement entrée et sortie par la dite rue." The action then is founded on a trespass and wrong illegally committed by the Corporation, and the defence, stating it generally, rests on two grounds: (1) that the street was lawfully closed under powers conferred by the Legislature, and, therefore, no wrong had been committed for which an action in this form will lie; and (2) that the plaintiff was not by law entitled to any indemnity for the damage complained of. The following are some of the material facts: St. Felix street opens, near the north end of the plaintiff's houses, into Bonaventure street, and extends northwards beyond the latter street to St. Antoine street. In its original state, it ran southwards from the plaintiff's houses to St. Joseph street. This part of it was crossed on the level by the lines of the Grand Junction Railway Company. The Bonaventure station was a short distance from plaintiff's houses, the ordinary approaches to it being in Bonaventure street. People could, however, go on foot from the station to St. Felix street, but only by walking over some lines of railway, and contravening, in so doing, the bylaws of the Company. It appears that a large number of persons, arriving by or waiting for the trains, went, in this manner, to St. Felix street, and frequented a house kept as a restaurant by one of plaintiff's tenants, which they could no longer do by this short cut, after the fence complained of was put up. In the years 1863 and 1864, the Bonaventure Railway Station was greatly enlarged, and the goods traffic transferred from another station to it. These arrangements rendered it necessary to carry additional lines of rails across St. Felix street to the south of the plaintiff's houses, making the passage there difficult and dangerous. To assist these gements of the railway company the Corporation uned ook to close the southern part of St. Felix street and open a new street to the south of the station. The manner in which the Corporation in fact closed or shut off this southern part was by placing a wooden barrier or fence, from 10 to 15 feet high, across the street, immediately to the south of the plaintiff's houses. The place where people used to enter St. Felix street, from the railway station, as before described, was to the south of this barrier, and the cutting off of this communication caused so great a diminution of the customers of the restaurant that the plaintiff's tenant gave up the business. The authority under which the Corporation closed the street is a by law made in pursuance of the Article the Provincial Legislature (23rd Vict., c. 72). Section 10 of Article the Provincial Legislature (23rd Vict., c. 72).

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purposes, and, among others (sub-section 6), "to regulate, clean, repair, amend, alter, widen, contract, straighten, or discontinue the streets, squares, alleys, highways, bridges, side and cross-walks, drains and sewers, and all natural water-courses in the said city." A general by-law was afterwards passed, section 3 of which is as follows: "The Council of the said city of Montreal may, and they are hereby authorized, whenever, in their opinion, the safety or convenience of the inhabitants of the city shall require it, to discontinue any street, lane, or alley of the said city, or to make any alteration in the same, in part or in whole." And, subsequently, on the 11th September, 1866, a special by-law relating to St. Felix street was made, which, after reciting that it was deemed expedient, in the interest of the public, to open a new street (describing it), "and to discontinue a portion of St. Felix street," ordains and enacts, that a new street, called Albert street, be opened, and that a section of St. Felix street, describing it by a plan and measurements (being the part to the south of plaintiff's houses) "be henceforth discontinued." It was not disputed that, under these powers, the Corporation might lawfully discontinue this portion of the street, but it was contended that they were bound, as an antecedent condition, to indemnify plaintiff, for the damage he would thereby sustain, and that erecting the barrier before doing so was an unlawful act and a trespass. The whole case, indeed, of the plaintiff, so far as this action is concerned, rests on the assumption that his property has been invaded in a way to constitute une expropriation, which, it was urged, could only be lawfully effected in conformity with article 407 of the Civil Code of Lower Canada, "upon a just indemnity previously paid." It was argued that the statute giving the power to make by-laws to discontinue streets should be held to have been passed subject to the general law embodied in this article. Article 407 runs thus: "No one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid." A similar Article is found in the Code Napoléon (article 545). These articles undoubtedly embody a fundamental principle of the old French law, which, whilst allowing private property to be taken for purposes of public utility, asserted its generally inviolable nature by requiring previous payment of a just indemnity. They are found, both in the French and Canadian Codes, under the title "De la Propriété," and, in both, follow the Section 10 of Articles which define property or ownership. The original Section 10 of Article, in the Code Napoléon, was in effect the declaration laws for various of a principle which, in France, has been applied by nu-

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merous special laws. In the Canadian Code, also, Article 407 is supplemented by article 1589, which is as follows: "In cases in which immoveable property is required for purposes of general utility, the owner may be forced to sell it or be expropriated by the authority of law in the manner and according to the rules prescribed by special laws." In the special laws passed, both in France and Canada, the principle of previous indemnity in cases of "expropriation," properly so called, appears to have been generally maintained. But exceptions have been made in works of urgency: and it is obvious that special laws, when passed by competent authority, may adopt, reject, or modify this principle. A distinction has long been made in France, and indeed it exists in the nature of things, between "expropriation," properly so called, in respect of which previous indemnity is payable, and simple "dommage;" and a further distinction between direct damage, which gives the sufferer a right to compensation, and indirect damage, which does not. Great research was displayed by the learned Counsel on both sides in investigating the history of French law and procedure on these subjects, the powers conferred on the Tribunals, and the conflicts between them. According to the opinion of Dalloz, the first complete system of procedure is to be found in the Law, 8 Mars 1810. A short history of this and other laws upon the subject will be found in Dalloz's "Répertoire," tit. "Expropriation," c. 1, p. 501. It is sufficient for the present purpose to note that a conflict arose under these laws between the ordinary Courts of law and the Administrative Tribunals, during which numerous decisions bearing on the present controversy took place. It was settled, at least after the Law, 8 Mars 1810, that the Courts of Law alone had jurisdiction to decide on the indemnity payable to owners of property in cases of expropriation, and that the province of the Administrative Tribunals was confined to cases of damage; but conflicts constantly arose as to whether particular cases fell within one or the other category, and the claims of owners of houses to indemnity for injury to their servitudes or quasiservitudes in public streets were a fertile source of them. Demolombe adverts to these conflicts in his "Traité des Servitudes," and thus sums up the controversy. (Vol. 12, art 700). Assuming, as he does, that the owners of houses bordering on streets are entitled to indemnity when "leurs droits d'accès ou de sortie, des vues ou d'égouts" are suppressed, or injuriously affected, he asks what is the competent authority to determine their claims? His answer is: "Cette question est elle-même fort délicate. C'est le pouvoir judiciaire, suivant les uns, puisqu'il s'agit d'une question de propriété

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privée. C'est, au contraire, d'après les autres, le pouvoir administratif, parce qu'il ne s'agit pas d'une véritable expropriation, mais seulement d'un simple dommage, quoique ce dommage soit permanent; et nous avons déjà dit (referring to vol. 9, art. 567), que telle paraît être aujourd'hui, après beaucoup d'hésitations et de luttes, la doctrine généralement suivie." Delalleau, in his "Traité de l'Expropriation," arrives at the same conclusion. (See Art. 152, 6th Edit., pp. 85 to 87). No doubt, in some of the French decisions and authorities, the violation of rights of this kind has been treated as "une expropriation réelle." But, in others, it has been spoken of as being only analogous to it, as thus: "comme s'il subissait une expropriation réelle d'une partie de sol." (See Delalleau, p. 86; Curasson, p. 211). Be this as it may, the result of the decisions appears to be correctly summed up by Demolombe, and it would seem that, in France, at the present day, damage to rights such as "droits d'accès" to streets is not deemed to constitute "expropriation." Indeed, upon a reasonable construction of the language of Art. 407 of the Code, it seems to apply to property which can be actually ceded, and for which indemnity could be fixed before it was ceded. The compensation allowed in France for "dommage," as distinguished from "expropriation," seems to be founded on an equitable principle which the special laws have adopted, subject to the regulations prescribed in them. But claims for damage, other than that arising from the cession of property, being for the loss caused by the execution of the works and as a consequence of them, it would be unreasonable to require previous indemnity; indeed, in many cases, the extent of damage cannot be previously ascertained. The distinction between the damage which grows from an expropriation, and that which arises from the execution of the works ("l'exécution ultérieure des travaux"), is plainly put and illustrated by Delalleau. The latter, he says, is, "non la suite de l'expropriation, mais la suite de l'exécution de travaux," and he shows how, in the nature of things, the indemnity for it cannot be assessed beforehand, but should be the subject of a subsequent inquiry, even in the case where an actual expropriation has taken place. (See Delalleau, art. 301 to 305). Assuming, then, that the plaintiff had rights in St. Félix street which have sustained damage, their Lordships think he has failed to establish an expropriation, or an injury which would give him a right to preliminary indemnity, so as to make the Corporation wrong-doers, and their act, in closing the street, a trespass and "une voie de fait," because such indemnity had not been paid. It seems to them that, if he has any claim, it is one to be prosecuted under the provisions

of the Act relating to expropriations by this Corporation (27) and 28 Vict., c. 60) which will be hereafter considered. (See, on this point, Jones and Stanstead Ry. Co., L. R., 4 P. C., 98, and 23 R. J. R. Q., 51). The Lordships observe that one of the grounds on which Mr Justice TASCHEREAU has sustained the action, instead of sending the plaintiff to the Special Tribunal constituted by the act referred to, is that the parties had submitted to the jurisdiction of the Court, but they are unable to find sufficient evidence of submission or consent in the record to justify this conclusion. Whilst, upon the considerations just referred to it seems to their Lordships that the present action is misconceived, they are reluctant to determine the case, without considering the other points (more nearly touching the merits of the claim) which were argued at the Bar. These were: that the plaintiff had suffered no injury which, by the French law, would give a right to indemnity; and that, if this were not so, the legislation authorizing the act which caused the damage, had taken away the right of action, without providing compensation. It cannot be denied that the law of France allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. Demolombe enumerates as undoubted the rights "d'accès ou de sortie, des vues ou d'égouts" (vol. 12, sec. 699), and the same rights are spoken of by Proudhon (vol. 1, art. 369). The right of access to a house is of course essential to its enjoyment, and if, by reason of alterations in the street, the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the law of France he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences. The occupiers of the plaintiff's houses can go from them into St. Felix street, and pass from it into other streets, and through them into all parts of the City. The only effect of making the street a cul-de-sac, so far as the rights of access and passage are concerned (apart from the loss of customers, to be presently noticed), is that the plaintiff's tenants have to go by other streets and further to reach the southern part of the city. The Counsel for the plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house in it as a servitude, and, undoubtedly, they were able to refer to some authorities in favour of this view; but the weight of authority appears to be the other With all their industry, the learned Counsel were unable to find, in the mass of French decisions on this subject, a single case in which it has been held that closing one end only of a street was an interference with the rights of access

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and passage which gave a claim to compensation. On the other hand, several authorities and decisions were cited to the contrary. Demolombe, in discussing the rights of access and other rights in streets (which he acknowledges are servitudes that cannot be interfered with by the Administration without making compensation), considers the passage a man enjoys over that portion of a street, which is not necessary for immediate access to his house, to be, not a right, but only an advantage of which he may be deprived without compensation. And among the instances of interference with mere advantages, as distinguished from rights, he gives the following: "Comme si, par exemple, l'administration diminuait la largeur de la place ou de la rue, ou même si elle fermait la rue par l'un de ses bouts, de manière à en faire une impasse." (Vol. 12, sec. 699, p. 205). In Dalloz, "Répertoire," tit. "Travaux Publics," sec. 816, it is said, that to give a claim to indemnity, according to the constant jurisprudence of the Conseil d'Etat, the damage must be material, and the direct and immediate consequence of the works executed by the Administration, and that for indirect damage no indemnity is due. And, in section 818, p. 949, he gives as an instance of indirect damage: "La dépréciation causée à une maison située dans une rue qui, par suite de travaux publics, a été fermée à une de ses extrémités, alors qu'elle reste, du côté opposé, une communication avec autres rues." In Dalloz, "Recueil," 1856, part. 3, p. 61, an important Arrêt of the Conseil d'Etat is set out, given in a case in which the owner of a house in a street at Toulouse, one end of which had been closed, claimed an indemnity of 40,000 fr. One of the considerants of this Arrêt, which affirmed the judgment of the Conseil de Préfecture rejecting the claim, is as follows: "Considérant que si la rue de l'Orme-sec a été fermée aux voitures à celle de ses extrémités qui aboutissait à la dite place, elle est restée ouverte du côté opposé, et se trouve encore en communication avec la nouvelle rue de l'Orme-sec; qu'ainsi la dite maison n'ayant pas été privée de son accès à la voie publique, la dépréciation qu'elle aurait pu éprouver ne constituerait point un dommage direct et matériel qui pût donner droit à une indemnité, etc." It certainly then appears that, in France, the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an interference with a servitude, nor (standing alone) such direct and immediate damage as will give a title to indemnity; and if this be so, there seems to be no reason or authority for declaring the law to be otherwise in Canada. The authorities referred to leave untouched the question whether, if a street were stopped at both its ends, indemnity

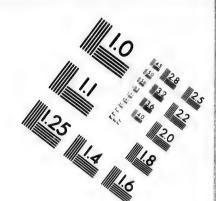
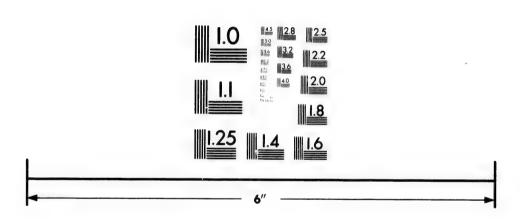


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would be payable. It is enough to say that should such a case arise, it might possibly be contended with effect that a virtual destruction of the undoubted rights of access to the houses in the street so closed had been occasioned which would give to their owners a title to indemnity. It was further contended for the plaintiff that beyond the mere passage through the street of which the occupiers of his houses were deprived, he had sustained special damage, by reason of the loss of customers, who formerly came from the railway station into the street and were now prevented from doing so, and that, thus, the value of his houses for the purpose of the particular trades carried on in them was depreciated. But, it is to be observed that there was no authorized road from the railway station to this street, and the people who came into it from the station did so in an irregular manner, and by passing over the lines and works of the railway, in contravention of the by-laws of the Company. This source of profit was obviously of a precarlous kind, and cannot be regarded as permanent. The street does not appear to have been much used, being inconvenient, if not dangerous, from the frequent passing of railway trains, and, apart from the custom of the railway passengers, no special advantage seems to have been derived from its being a thoroughfare. French cases were cited to the effect that the loss of customers (unless, indeed, the right of access, as before interpreted, is infringed) would not be such a direct and immediate damage as would give a claim to indemnity. (See Dufour, "Droit Administratif appliqué," 275, 277, 323.) A similar decision was given by the House of Lords, in Ricket vs Metropolitan Rulway Company, L. R., 2 H. L., 175. Whether, if the closing of the street had cut off the plaintiff's houses from a place the occupiers had long used in connection with them, as from a wharf upon a public river, or had rendered the immediate approach to the houses difficult or inconvenient, he would have been entitled, by French law, to indemnity upon the principle on which two English decisions, turning upon facts of the kind just supposed, were determined, it is unnecessary to consider. But, the present case differs from the supposed ones. The immediate access to the houses is not obstructed, and the occupiers of them had no special object beyond that of their neighbours in going to the part of the city which lies south of the barrier. Indeed, there is no evidence that any inconvenience. was felt on this score, and probably none could have been given, for there appears to be another street, easily accessible. to the occupiers of the plaintiff's houses, by which this part of the city can be reached, and which, whilst only a little

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" 275, 277, 323.) se of Lords, in R., 2 H. L., 175. off the plaintiff's long used in a public river, to the houses en entitled, by on which two nd just suppossider. But, the The immediate he occupiers of eir neighbours south of the inconvenience uld have been asily accessible vhich this part t only a little

further, is probably more commodious, being ters liable to obstruction from the operations of the railway. The gravamen of the damage, as proved, was the loss of the custom of the railway passengers already adverted to. No doubt the distinctions in the cases on this subject are fine. The English decisions (which are only referred to by way of illustration) as well as the French have been conflicting, and the boundary lines between them are, in consequence, somewhat indistinct. (See Metropolitan Board of Works v. McCarthy, L. R., 7 H. L., 243. Beckett v. Midland Railway Company, L. R., 3 C. P., 97.) One ground of damage complained of is due not to the discontinuance of the street, but to the manner of closing it. It is said the barrier which has been erected darkens the plaintiff's houses. It may be that the plaintiff has some ground of complaint on this head, but he has not alleged in his declaration that the windows of his houses have been deprived of light, but only that the street has; been darkened; nor does the evidence distinctly show a deprivation of light; to an actionable degree, nor is such a deprivation found as a fact by the experts or the Judges. The great contest in the cause has been as to the damage arising from the suppression of the street, and not that due to the form of the barrier. Throughout Mr. Justice Taschereau's judgment, in which that learned Judge ably supports his own view, there is no allusion to loss of light as a substantive grievance. If, however, this or other damage has been occasioned by the proximity of the barrier, it would be recoverable, if at all, under the Corporation statutes. The amount of damage assessed in the action is, in the main, given in respect of loss of custom and the consequent depreciation in the value of the houses. The other questions argued turned upon the special Statutes relating to the Corporation. It was contended that these Acts excluded an action for indemnity, and gave no compensation in cases like the present. For the plaintiff, it was denied that the action was thus excluded, but it was said that, if taken away, compensation was given. Upon the English legislation, on these subjects, it is clearly established that a Statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule, in England, that, though the action is taken. away, compensation is only recoverable when provided by the Statutes, and in the manner prescribed by them. In practice, it is generally provided in respect of all acts by which lands are "injuriously affected"—words which have been

held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable. if the work causing it had been executed without statutable authority. In the Canadian Act (23 Vict., c. 72, s. 10), authorizing the by-law in question, no compensation is expressly provided for the damage which may be caused by any of the acts it authorizes to be done. But, in a previous Act (14 and 15 Vict., c. 128), provision for compensation is expressly made in two instances. Thus, the power to make by-laws for altering the footpaths or side-walks of any street is conferred, subject to the provision "that the Council shall make compensation out of the funds of the city to any persons whose property shall be injuriously affected by any such alteration of the level of the footpath in front thereof." And the power to make by laws for changing the sites of markets and appropriating the sites, saves to any party aggrieved "any remedy he may by law have against the corporation for any damage he might thereby sustain." The Counsel for the corporation referred to two or three other instances of express provisions in former acts relating to this corporation, and also to sets of acts authorizing roads, bridges, and other public works, which provided compensation in express terms, and contended that it might be inferred from this course of legislation that the intention was to exclude compensation, whenever it was not expressly given. On the other hand, the Counsel for the plaintiff relied on the fact that no compensation was provided by the Act authorizing the by-law in question, although the power it conferred woold, it was said, justify an interference with property, and with undoubted servitudes, and also upon the difference between English and French law, arising from the existence of the Article of the Code, and the dissimilar systems of procedure in the two countries. Their contention, in substance, was that the special Acts should be read with and subject to Article 407 of the Code in the cases to which it was applicable, and also to the general law which gave, in certain cases at least, a right to indemnity for damage. Whatever may have been the effect of the special Acts relating to this corporation before the passing of the 27 and 28 Vict., c. 60, they must now be read and considered with it. That Act is indeed a Statute upon expropriations, After reciting in the preamble that much difficulty was often experienced in carrying out the law in force relating to expropriations for purp ses of public utility, it establishes a tribunal consisting of commissioners for determining the value of property expropriated, and a system of procedure for such cases. Then the 18th section enacts that these provisions shall be extended to all cases in which it becomes

authority to n actionable. ut statutable . 10), authoris expressly y any of the ct (14 and 15 ssly made in for altering erred, subject compensation ose property ration of the the power to ts and appro-"any remedy any damage e corporation ess provisions also to sets of works, which ontended that ation that the ver it was not unsel for the was provided , although the interference and also upon , arising from the dissimilar eir contention, be read with ases to which which gave, for damage. al Acts relathe 27 and 28 ered with it. ations. After y was often e relating to establishes a ermining the of procedure s that these ch it becomes necessary to ascertain the compensation to be paid for any damage su-tained by reason of any alteration in the level of footways made by the council, or by reason of the removal of any establishment subject to be removed under any bylaw of the council, "or to any party by reason of any other act of the council, for which they are bound to make compensation." It was contended for the corporation that this general clause referred only to such compensation as was expressly mentioned in their statutes, though they could only point to two instances of such compensation which could satisfy the words, and these were contained in a Road Act (36 Geo. 3, c. 9), the powers of which were transferred to the corporation. Whilst for the Plaintiff it was said that if it be held that actions for indemnity are taken away, this sweeping clause ought to be construed so as to comprehend all cases of damage for which, by the general law, indemnity would be due, and as being in effect equivalent to the common clause in the English statutes containing the words "otherwise injuriously affected." Reading the clause in the latter sense compensation would be expressly given by it to all who may suffer to use the English phrase actionable damage. A provision to this effect, if it be made, would no doubt be equitable and reasonable; whereas if it be not made the scheme of compen-ation provided by these Acts would seem to be defective. Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised. since, in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27 and 28 Vict., c. 60, was passed, they think that this enactment, by requiring that the compensation payable to any party "by reason of any act of the council for which they are bound to make compensation," shall be ascertained in the manner prescribed by the statute, excludes, by necessarv implication, actions of indemnity for damage in respect of such acts. It is enough, therefore, to say that in their view the corporation, having acted within their powers, the Plaintiff's claim (if sustainable at all) is of a kind which would fail to be determined by the Commissioners under the special Act. It may be observed that the question of procedure in cases of this kind is not merely a technical one, this was pointed out in the judgment of this Committee in Jones vs Stanstead Railway Company (1). It is there said: "The claim for damages in an action in this form, assumes that the acts in respect of which they are claimed are unlawful. whilst the claim for compensation under the Railway Acts

⁽¹⁾ Law Rep., 4 P. C., 98, and 23 R. J. R. Q., 51.

supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had." On the whole case their Lordships find themselves unable to concur in the judgment pronounced by the majority of the Judges of the Court of Queen's Bench, and they will humbly advise Her Majesty to reverse both the judgments below, and to direct that that action be dismissed with costs. The Respondent must pay the costs of this appeal. (18 J., p. 225; 22 J., p. 1; 1 L. R., A. C., p. 384; Beauchamp, p. 263 et 765.)

Messrs. WILDE, BERGER, MOORE and WILDE, Solicitors for

the Appellants.

Messrs. Bischoff, Bompas and Bischoff, Solicitors for Respondent.

ORAL EVIDENCE.

SUPERIOR COURT, Montreal, 31th October, 1873.

Coram TORRANCE, J.

BEARD vs McLAREN.

Held:—That proof by witnesses is inadmissible of a new sale between parties to a first sale of the same goods without a writing or a previous delivery in execution of the last sale.

TORRANCE, J.: Action of damages for non delivery of coal by defendant to plaintiff. The declaration alleges that plaintiff, on 8th July, 1871, sold and delivered to defendant 37 tons, 430 lbs, at price of \$4.75, amounting to \$176.68; that delivery was made at 267 St. James Street; that, on or about 20th October, 1871, defendant inquired of plaintiff at what cost he would undertake to remove said coal to Mercantile Library buildings, whereupon plaintiff offered, instead of undertaking said removal, to cancel said first sale, and sell and deliver to defendant, at last mentioned premises, other coal known as Scotch steam coal, at \$5.50 per ton, which offer defendant accepted, and it was agreed, between plaintiff and defendant, that said first sale should be cancelled, and it was then cancelled; and that defendant should then deliver up said first mentioned coal at said premises, n° 267 St. James Street, to plaintiff, and plaintiff then sold and delivered to defendant 45 tons 820 lbs of said Scotch steam coal, at \$5.50, which were settled for by defendant. Plaintiff then alleges breach. on the part of defendant, to redeliver; increase in the value

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of the coal, which is now \$362.53; conclusions by plaintiff, that defendant re-deliver said coal or pay the value, &c. The defendant pleaded that it was true that he had ordered from plaintiff, about 11th June, 1871, about 35 tons of coal for price of \$4.50 per ton of 2240 lbs.; that plaintiff fraudulently delivered coal which he pretended weighed 81,830 lbs, but which only weighed about 62,000 lbs; that afterwards. plaintiff and defendant agreed to have said coal re-weighed; that, afterwards, it was proposed that plaintiff should take back the coal unburned, defendant having consumed a certain portion, but defendant insisted that the coal should be reweighed; and allowance made for that which had been burned, and that the actual quantity delivered by plaintiff to defendant should be established, and, from the quantity so established, should be deducted the quantity still on hand which should be re-taken by plaintiff, defendant paying for what he had consumed at \$4.50, but plaintiff refused and insisted that the quantity delivered should be taken as 81,830 lbs. and that defendant should pay for the difference between that quantity and the quantity still on hand at a much higher rate, which defendant refused. The following question is put to the witness, James Leslie: After the defendant moved into these new premises, in the Mercantile Library buildings, was anything said in reference to cancelling the sale of the quantity of coal which he had delivered into the cellar of the St. James Street premises, and, if so, what? This question was objected to by defendant, and the objection was maintained by the presiding judge (Johnson). The plaintiff takes the ground that the cancellation of the contract could be proved by parol. The Court is now called upon to revise this ruling. The general rule as to cancellation, as I understand it, is that parol evidence is admissible. Smith, on contracts, uses these words: "It (Statute of Frauds) does not forbid their being rescinded by parol; and there is no doubt that they may be so rescinded," p. 133. But it has been laid down, by Lord Lyndhurst, that, although such waiver is unquestionably admissible, according to the rule stated, it must be in effect a total dissolution of the contract, such as would place the parties in their original situation. Browne, p. 435. Phillips and Greenleaf both consider such evidence admissible. On the other hand, we have the weighty authority of Lord St. Leonards, who gives it as his opinion, on a review of the case. that, perhaps, the better opinion is that it is inadmissible at law. There is another view which may be taken of the case. The case under consideration, as raised by the pleadings, is not so much a cancellation of the contract as a variation of the original contract, or a substitution of the new one for the old.

The plaintiff charges that defendant refused to re-deliver to him the 37 tons of coal, the sale of which had been cancelled. The Court sees here an attempt to prove by a witness a new sale by defendant to plaintiff, without any previous delivery and without any contract in writing, contrary to C. C. 1235, Noble v Ward, 1 Excheq., 115, and 2 Excheq., 135, would sustain the doctrine that the substitution of one contract for another cannot be proved by parol. The motion is rejected. (18 J_{γ} , p. 76.)

J. WOTHERSPOON, for plaintiff. W. H. KERR, Q. C., for defendant.

MOTION TO AMEND.-PROCEDURE.

SUPERIOR COURT, Montreal, 31st March, 1874.

Coram TORRANCE, J.

BEARD vs McLAREN.

Held:—That a motion to amend the declaration in a cause under C. P. 320, is premature during the plaintiff's Enquête.

Semble: such motion would be premature before final heaving on merits.

The pleadings in this case already appear in the preceding report, p. 462.

PER CURIAM: The plaintiff has examined several witnesses, and now moves that "he may be allowed to amend his declaration, so that it may agree with the facts proved, by striking out, from the conclusions theoreof, from the words "to release and deliver up" to the words "that he be ordered," &c. Plaintiff cites in support C. C. P. 320. The Court has hitherto, as a general rule only applied the provisions of this article when a case has come up on the merits. At the present stage, the motion is premature, and the Court will not now decide how far the plaintiff has made out his case. Motion dismissed. (18 J., p. 78).

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J. WOTHERSPOON, for plaintiff. W. H. KERR, Q. C., for defendant. re-deliver to een cancelled. witness a new vious delivery to C. C. 1235. 35, would susne contract for

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RESPONSIBILITY POR MALICIOUS ARREST.

SUPERIOR COURT, Montreal, 30th September, 1873.

Coram Johnson, J.

BÉLANGER vs COLLIN.

Held:—That no action of damages will lie against a party for having caused another to be arrested, if probable cause and no malice be proved even although the grand jury have found no bill against the party accused.

The plaintiff alleged that, on the 27th of April, 1872, defendant having missed a sum of \$35.25, immediately accused plaintiff, who was then voluntarily in his service, without any remuneration, of having stolen twenty-five cents of the said sum, and he also accused plaintiff of having stolen another sum of \$40.00 from him, and had him arrested and confined in prison until the next day, wher plaintiff gave bail; that the matter was referred, by the Police Magistrate, to the Court of Quarter Sessions, where two indictments were laid against him, on which the grand jury found no bill, and plaintiff was discharged; that the accusation was made without sufficient ground, and plaintiff suffered damages to the extent of \$800, and he prayed that defendant be condemned accordingly. Defendant pleaded that he had reasonable and probable cause for having plaintiff arrested, and that he had acted in good faith, and without malice; that, on missing the money, he bold plaintiff that he suspected him, and plaintiff seemed emtarrassed, and admitted that he did take the sum of twentyfive cents belonging to defendant; that plaintiff also offered to repay to defendant the said \$35.25, if he got delay, and, upon defendant's refusal to give delay, plaintiff went away saying that he was going to get money from his brother-inlaw to settle the affair, but he never returned; that, under these circumstances, defendant caused plaintiff to be arrested and, upon such proof, the Police Magistrate referred the case to the Court of Quarter Sessions, and defendant was fully justified in having plaintiff arrested.

Johnson, J.: Action of damages for malicious prosecution. The charge brought against the plaintiff was, or rather the charges were, for there were two, that, on the 27th day of April, 1872, he had stolen \$35.25 from defendant, and, on the same day, another sum of 25 cents. The defence is that the charges were brought in good faith, and with probable cause. I think this defence is fairly made out. The defendant's conduct justly subjected him to suspicion, and defendant was

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quite justified in having him arrested. The grand jury, at the Quarter Sessions, threw out the bills; which, I think, is, in all such cases, a fair presumption that the accusation is unfounded; but it is nothing more, it supplies nothing in the way of evidence of malice, or of want of probable cause, which are essentials of this action. There is nothing on this head, except an expression of defendant, to the effect that he had had plaintiff arrested with the view of finding out who was the thief. The confession of plaintiff that, at all events, he had stolen the 25 cents, is of itself very strong against him; but all the circumstances of the case must have rendered it extremely probable, in the estimation of defendant, that plaintiff had taken all the money that disappeared, and, acting, as he did, with probable cause, not to say with confessed guilt on the part of plaintiff, he is absolved from all consequences, and the action is dismissed, with costs. The Court considering that defendant has proved his plea, and that the arrest and prosecution complained of were made and had without malice and with probable cause, doth dismiss plaintiff's action, with costs. (18 J., p. 78.)

O. Auge, for plaintiff. GIROUARD & DUGAS, for defendant.

ASSURANCE AGAINST FIRE.

COURT OF QUEEN'S BENCH, Montreal, 24th June, 1873.

Coram Duval, Ch. J., Drummond, J., Badgley, J., Monk, J., Taschereau, J.

THE COMMERCIAL UNION ASSURANCE COMPANY, Defendants in the Court below, Appellants, and THE CANADA IRON-MINING and MANUFACTURING COMPANY, Plaintiffs in the Court below, Respondents.

A policy of insurance contained the following condition endorsed upon it, viz., "The Company will not be answerable for any loss or damage by fire occasioned by earthquakes, or intricanes or by burning of forests; and this policy shall remain suspended and of no effect in respect of any loss or damage (however caused) which shall happen or arise, during the existence of any of the contingencies aforesaid."

Held:—Such a clause is legal, and in order to exempt the Company from liability it is only necessary to prove that at the time of the loss

the neighboring forest were burning.

The appeal was from the following judgment of Justice Mondelet, rendered on the 30th November, 1871: "The Court considering that plaintiffs have proved the material

rand jury, at ch, I think, is, e accusation is nothing in the e cause, which this head, exat he had had who was the vents, he had. inst him; but dered it extrethat plaintiff d, acting, as he fessed guilt on nsequences, and art considering the arrest and without malice 's action, with

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ey, J., Monk, J.,

, Defendants in CANADA IRON-Plaintiffs in the

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ent of Justice 1871: "The d the material allegations of their declaration, and, namely, that, by and in virtue of the policy of insurance invoked, they have the right to recover of and from defendants the sum of \$2,150, being the amount of the loss and damage they have suffered by the destruction by fire of their property: Considering that defendants have failed to substantiate their plea, and, namely, that plaintiffs' said property was destroyed by burning of forests, as by them pretended, the said plea is hereby dismissed, with costs, and defendants are adjuged and condemned to pay plaintiffs the sum of \$2,150, with interest thereon. from the 16th of February, 1871, the day of service, and costs of suit." The principal allegations of the declaration were: "that, under Policy no 143, 717, of date 18th January, 1870. appellants, subject to the conditions and stipulations endorsed on and annexed to the policy, agreed to pay to respondents all the damage and loss which they might suffer by fire on the property insured, to wit, on certain buildings situate at Hull, in the Province of Quebec; that, about the 17th of August, 1870, a fire occurred, without the act or knowledge of respondents, and from some cause unknown to them, in and upon the premises insured, and the loss exceeded the amount insured; that the usual notices were given, and the conditions of the policy conformed to, and respondents claimed \$2,150 the amount of insurance." Appellants pleaded specially: "that plaintiffs cannot maintain the present action against defendants, because, in and by the policy, it was and is expressly declared and agreed that the same should be subject to the several conditions and stipulations endorsed thereon or annexed thereto, and which conditions and stipulations were thereby declared to constitute the basis of the insurance effected by said policy; that, in and by one of such conditions and stipulations endorsed upon or annexed to the policy, to wit, the ninth, it was and is stipulated that: "The Company (to " wit, defendants) will not be answerable for any loss or da-" mage by fire occasioned by any invasion, foreign enemy, "insurection, civil commotion, riot, or any military or usurped power whatever, or which shall happen or arise after war " shall have been declared against the country wherein the in-" sured property is situate, or after the invasion of any terri-"tory of such country, or during the administration of mar-"tial law, nor for any loss or damage by fire occasioned by "earthquakes or hurricanes, or by burning of forests; and "this policy shall remain suspended and of no effect in res-"pect of any loss or damage (however caused) which shall "happen or arise during the existence of any of the contin-"gencies aforesaid;" that, at the time of the fire and loss alleged, the forest in the neighborhood and immediate vicinity

of the property described in the policy were on fire, and the loss and dumage to such property was occasioned by burning of forests, and not otherwise, and happened and arose during one of the contingencies mentioned in the cited condition to wit, the burning of forests, and during which contingency the policy was, by virtue of the said condition and stipulation suspended and of no effect." Plaintiffs answered: "that the fire was not occasioned by the burning of forests, and the loss and damage did not happen or arise during the existence of any of the contingencies mentioned in the ninth condition, and the policy was not, at the time of the fire, suspended and of no effect; that the part of the country in question was thickly settled and cultivated, and there were, at the time of the fire, and are no forests in the vicinity or neighborhood of the said property; that the fire came from a north-easterly direction, and between plaintiffs' property and the nearest bush, to wit, on the property adjoining that of plaintiffs, there were a large number of houses, in fact, a small village, called Rafting Ground, and that the fire came from said buildings, and was not communicated from any forest." It was proved that a forest or growth of trees ran down the sides of a creek, directly on to re-pondents' property; that it and all the other woods in the surrounding country were on fire; and that the fire was communicated from these fires to a group of 18 or 20 houses named Rafting Village, and thence through the lumber on Gilmour's piling ground to respondents' property. It also came from Donnelly's woods, three-quarters of a mile distant. and perhaps from other woods, as the whole of the neighboring forests were in fire, the wind was high, it sparks and ashes were flying about in all directions, and, as one witness said, "the fire seemed to be in all the air." The line of argument adopted by respondents' Counsel was: 1st. That, by the word "forests," was meant primeval forests; 2nd. That there were no primeval forests in the neighborhood, and that the condition of the policy had no reference to this case.

BADGLEY, J., said that this was an action brought on a policy of insurance, for loss by fire near Ottawa. The only contention in the case was on the clause exempting the Company from payment of loss occasioned by burning of forests. As matter of fact, fires had been burning in the forests, at some distance from the scene of this loss, but there was no forest fire for two or three days before the accident, although a day or two before, some timber trees on the banks at a mile distant had been burned. There were no trees or forest on the respondents' property, but the forest was more or less connected with it by trees on the bank which in one part were near Messrs. Gilmour's lumber yard. And it is quite clearly

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rought on a po-. The only conng the Company of forests. As orests at some e was no forest although a day at a mile disr forest on the pre or less conone part were is quite clearly

proved that the respondents' property took fire from the lumber yard, which in its turn took fire not from actual "forest fires," but from the fires from the forest fire, which reached to the trees on the stream. It is a rule well established that, in the absence of all fraud, as in this case, the proximate cause of loss only is to be looked at. The rule is a just one, because otherwise the most remote and unconnected cause of the fire would govern the insurance. But in this case, tracing the cause of the fire from the appellants' buildings to their neighbors, the wooden rafting village, and from that to the Gilmours' immense lumber yard, which took fire from the burning of the trees on the stream, which trees could only have been ignited from the burning forest, it appears that respondents' property was burnt from the cause excluded from the protection of the policy. The appellants must, there-

fore, be relieved from payment of the loss.

The following is the judgment of the Court of Appeals: "The Court, considering, 1st. That the action was brought upon a policy of insurance bearing date the 8th Jan., 1870, by which defendants (appellants here) agreed to pay to plaintiffs (respondents here) all the damage and loss which they might suffer by fire on certain buildings, situate at Hull, P. Q., subject to the conditions and stipulations endorsed and annexed to the policy. 2nd. That, in or about the 17th Aug. same year, the buildings so insured were destroyed by fire. But, considering 3rdly, that, by the 9th condition to which the said policy was made subject, it was stipulated and agreed, between the parties thereto, that the Company would not be answerable for any loss or damage by fire occasioned by burning of forest, and that the policy should remain suspended and of no effect in respect of any loss or damage, however caused, which might happen or arise during the existence of any such contingency. 4thly. That, as it appears in evidence, for weeks before the destruction by fire of the buildings so insured, the woods and forests surrounding the property were burning. 5thly. That the fire which consumed the buildings so insured proceeded from the burning forest, destroying every thing in its course, until it reached the property belonging to respondents. 6thly. That under the stipulation contained in the 9th. condition, the policy was suspended and of no effect during the time said forests were so burning, and that the fire by which the insured buildings were consumed proceeded from the said burning forests, the appellants were and are released from all legal responsibility or liability in regard of the loss and damage suffered by the respondents from the destruction thereof; considering, therefore, 7thly, that, in the judgment appealed from, pronounced on the 30th Nov. that 1871, by the Superior Court, in Montreal,

there is error, this Court doth reverse and annul the same, and, proceeding to pronounce the judgment which the Court below ought to have rendered, this Court doth maintain the exception of appellants, and doth dismiss the action of respondents, with costs against them in both Courts." (18 J., p. 80.)

RITCHIE, MORRIS & ROSE, for appellants.

ABBOTT, TAIT & WOTHERSPOON, for respondents.

ENQUETE .- PRIVILEGED COMMUNICATIONS.

SUPERIOR COURT, Montreal, 31st October, 1873.

Coram TORRANCE, J.

ETHIER vs HOMIER.

Held:—That a professional adviser cannot refuse to answer as a witness, where he is a party to the transaction as well as adviser.

PER CURIAM: This case is before the Court, on a motion to revise the ruling of the Judge at Enquête. The action is an action of damages, for injures, in writing anonymously an offensive letter to J. L. Beaudry, reflecting upon the character and conduct of plaintiff, and those frequenting her house. On the 5th June last, F. X. Archambault, an attorney of this Court, and an attorney ad litem in this cause for defendant, was sworn as witness of plaintiff, and put the following question: "Will you say whether, on or about the 30th October last, i.e., long before the institution of the present action, it is within your knowledge that defendant wrote, or caused to be written, the anonymous letter produced at Enquête in this case? Say what you know on this subject." The witness objected to answering, pleading that all he knew of the matter was as professional adviser of defendant. The question was overruled by the Judge at Enquête, and, afterwards, by the Court in term. On the 1st October, the same witness was put the following question: "Take communication of exhibit "C" of plaintiff, which was produced at Enquête, and say whether you wrote this letter, at the request of defendant?" This question was again overruled by the presiding judge at Enquête, (MONDELET, J.) and now is before the Court in term for revision. It is to beborne in mind that the charge against defendant, in the declaration, is that he wrote, or caused to be written, the letter complained of. The rule of our code as to professional men is in C. C. P. 275. He cannot nul the same, nich the Court maintain the action of resourts." (18 J.,

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be compelled to declare what has been revealed to him confidentially in his professional character, as religious or legal adviser, or as an officer of state where public policy is concerned. Guyot, vo. Avocat, makes the qualification, "unless his client has fraudulently reposed confidence in him, only to get rid of his testimony." Taylor, on Evidence, sec. 852, mentions exceptions to the rule: "These apparent exceptions are, where the knowledge was not acquired by the attorney, solely by his being employed professionally, but was in some measure obtained by his acting as a party to the transaction, and the more especially so, if this transaction was fraudulent," &c Rolfe, V. C., observed, in Follett vs Jefferyes, 1 Sim. N.S. 3, 17: "It is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor." At § 931, Taylor continues: "If an attorney, having been engaged in a conspiracy, be willing to turn informer, he cannot be prevented from disclosing what he knows of the transaction." And, further on, under the same section, page 823, Taylor alludes to the general principle that, if an attorney acts as a party, no knowledge he obtains will be privileged. It is to be borne in mind that the privilege, where it exists, is that of the client and not of the attorney, and it appears to me that, if the attorney here has written a libellous letter, at the request of his client, it would be most unreasonable to allow him, and the elient, to decline to answer, in a Court of Justice, as to whether such letter were written by the attorney, at the request of the client. Greenleaf, Ev., vol. 1, sec. 242, says ; "If the attorney were a party to the transaction, he would not be protected from disclosing." One case was cited at the bar of this Court which is in point: Mackenzie vs Mackenzie (1). There, it was held that an attorney could not refuse to declare what moneys he may have in his hands belonging to a defendant in the cause, on the ground that his doing so

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⁽¹⁾ L'avocat, tiers saisi dans une cause, ne peut refuser de déclarer quel montant de deniers appartenant au défendeur il a en main, sons prétexte que faire cette déclaration serait violer le secret professionnel. Art. 275 C. P. C. P. C. (Mackenzie et al. vs. Mackenzie, et Mackenzie et al., t. s., C. S., Montréal, 20 septembre 1864, Berthelot, J., 9 J., p. 87, et 14 R. J. R. Q., p. 1904.

would be a betrayal of professional confidence. On the whole, the motion will be granted, and the witness ordered to answer the question. (18 $J_{\cdot \cdot}$, p. 83.)

C. C. DELORIMIER, for plaintiff. C. GEOFFRION, for defendant.

CRIMINAL PROCEDURE.

COURT OF QUEEN'S BENCH, CROWN SIDE,
Montreal, 9th, 10th, 11th April, 1874.

Coram RAMSAY, J.

REGINA ve DOUGALL et al.

Held:—1. That an application to postpone a trial, in consequence of the absence of material witnesses, must be supported by special affidavit showing that the witnesses are material.

2. That on a trial on an indictment for libel, the defendant cannot

plead or prove the truth of the libel.

3. That the English Act of 1792, 32 Geo. III, c. 60, is in force in Canada, and consequently it is for the Jury to say whether under the facts proved there is libel, and whether the defendant published it.

facts proved there is libel, and whether the defendant published it.

4. That where the defendant has asked for a jury composed one half of the language of the defence, six jurors speaking that language may first be put into the box, before calling any juror of the other language.

5. The right of the Crown to tell jurors to "stand aside" exists for

misdemeanors as well as for felonis.

6. When to obtain six jurors speaking the language of the defence, all speaking that language have been called, the Crown is still at liberty to challenge to stand aside, and is not held to show cause, until the whole panel is exhausted.

7. That, on a trial for libel, acts of the defendant immediately after the publication may be proved, in order to show that there was no

malice.

8. That the existence of rumours cannot be proved in justification of the libel.

The following are the Rulings of the Court, on questions arising in the case of the Queen vs Dougall et al., on an indictment for libel, tried on the 9th, 10th and 11th days of April, 1874.

Mr DEVLIN moved to put off the trial till next term, owing to the absence of two witnesses whose evidence was material

to the defence.

RAMSAY, J., said this could only be done on special affidavit, showing that the witnesses were material, and time would be given to the defence to draw the affidavit.

On the part of the defendants the following affidavit was filed: "George H. Flint, of the city of Montreal, district of

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ing affidavit was treal, district of Montreal, reporter, being duly sworn, doth depose and say: that he is and was employed as reporter for the defendants' newspaper, the Daily Witness; that he saw Charles Lormier, for whom a subpæna has been issued in this cause, during his illness created by an attempt made by himself, as deponent was informed, upon his life; that this deponent communicated with Lormier, in the Hotel Dieu, through an attending physician who spoke French, the language of Lormier, deponent's object being to ascertain all the particulars and circumstances which led him to attempt the taking of his own life, these he promised to give at a subsequent occasion; that this happened on the seventeenth day of February last, before the publication of the article of that day, and complained of; that deponent renewed his visit the next day, but was not permitted to see, or to hold any conversation with Lormier; that deponent believes that Lormier is the only man who could account for the causes which led him to attempt his life, and to what extent the reports then in circulation, as to his reasons for so doing, were well founded, and that, if it be, as this deponent is informed, it is material for the defence to show who were in the company of Lormier and the woman called his wife, during his stay in Montreal, and his visits in the house known as the Maison Dorée, and especially, who were in his company at the said hour, on the night between the fourteenth and fifteenth days of February last, such facts can best be established by his testimony and also by the testimony of the said woman then known as his wife; and deponent verily believes these are the only persons whom defendants can call as witnesses to establish these facts. And deponent hath signed. (Signed) GEORGE H. FLINT."

DOUTRE, Q. C., and with him DEVLIN, were heard in sup-

port of the application.

Carter, Q. C., and Kerr, Q. C., were heard con'ra, and they filed the following affidavit: "Lucien Huot, avocat, de la cité de Montréal, ayant été dûment assermenté sur les saints Evangiles, dépose et dit: qu'il a connu Charles Lormier, jeune Français, qui s'est trouvé à Montréal en février dernier; qu'il a été, après que Lormier eut attenté à ses jours, l'aviseur et le procureur spécial dudit Charles Lormier, avec l'approbation et l'assistance de Monseigneur Fabre, Evêque de Gratianopolis; qu'à sa connaissance personnelle, Lormier est parti pour l'Europe pour ne plus revenir, quinze ou vingt jours après l'accident, le ou vers le quatre mars dernier; que Lormier a circulé dans la cité de Montréal, pendant plusieurs, jours avant son départ pour l'Europe, et qu'il venait au bureau du déposant jusqu'à deux fois par jour, pendant cinq

ou six jours avant son départ, à la connaissance d'un grand nombre de personnes; que la femme qu'on appelait madame Lormier, mais dont le véritable nom était Marguerite Prélippe, épouse d'un nommé Dauge en France, et laquelle était ve ue en Canada avec Lormier, a été envoyée aux Etats-Unis, où il était convenu qu'elle devait se rendre en partant de Montréal, plusieurs jours après l'accident, avec les fonds que Lormier avait mis à sa disposition pour son voyage, sur la demande spéciale de Monseigneur Fabre lui-même, qui s'intéressait au sort de ce jeune homme dont il avait connu la famille en France, et aussi sur les instances dudit Charles Lormier qui voulait ne plus la revoir; qu'il a appris de source certaine que cette femme Dauge est en ce moment aux Etats-Unis, depuis la fin de février dernier; qu'il sait, par la voie du Courrier des Etats Unis, de New York, que Lormier est parti pour l'Europe, le huit ou le dix de mars dernier, lequel dit Lormier avait informé le déposant qu'il se rendait dans sa famille, à Amiens, en France. Et ledit déposant a signé. (Signé) LUCIEN HUOT."

After both affidavits were read and the hearing of counsel on both sides.

RAMSAY, J., said there was no great difference of opinion as to the principle upon which the application must be decided. The affidavit filed by the defence was defective in not stating that it is probable that the presence of these witnesses could be procured at the next term. This defect perhaps might be overlooked, as this was the first term at which the case was fixed for hearing; but the effidavit was wholly insufficient in not setting up any legal evidence that the absent witnesses could give. The defence were quite right in saying they were not obliged to disclose all the witnesses could testify to; but they must show that they can likely prove some fact which could go to the jury. This has brought up a question that must arise at the trial, and the Court was glad, before beginning, to put both parties on their guard that it would not be permitted to the prosecution to prove the untruth of the libel, or to the defence to prove that it was true. It will be observed that, in England, the truth of the libel is only allowed to be proved on a special plea alleging that the facts set forth in the libel are true, and that they were published for the public benefit. This is under the Act of the 6 and 7 Vic. which is not in force here. It is evident then that, on the plea of "not guilty," as pleaded in this case, even in England, the truth of the libel would not be in issue. Allusion has also been made to the Act of 32 Geo. III, c. 60, commonly known as Fox's libel bill, and it is urged, on the part of the prosecution, that that Act, being passed subsequently to the ance d'un grand ppelait madame guerite Prélippe, uelle était ve ue Etats-Unis, où il ant de Montréal, nds que Lormier sur la demande i s'intéressait au nu la famille en rles Lormier qui source certaine aux Etats-Unis, , par la voie du Lormier est parti ernier, lequel dit rendait dans sa éposant a signé.

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nce of opinion as must be decided. ve in not stating e witnesses could perhaps might be ich the case was lly insufficient in absent witnesses in saying they could testify to; prove some fact ht up a question was glad, before rd that it would e the untruth of as true. . It will he libel is only ng that the facts were published t of the 6 and 7 hen that, on the ven in England,

. Allusion has c. 60, commonly the part of the sequently to the introduction of the English criminal law into Canada, was not in force. I stopped the counsel for the defence, in their argument on this point, for I am clearly of opinion that that act is in the nature of a declaratory act, and that it is in force here. The prosecution has cited an authority which treats it as an alteration of the law, but that is only a deferential mode of dealing with any expression of opinion on the part of the Judges commonly used in England. Historically, it is declaratory. It will be remembered that the Judges laid down the doctrine that libel, or no libel, was matter of law for the Court, and they only left to the jury whether the defendant published. Juries refused to be guided by this monstrous doctrine, the object of which was really to create an exception to the general rule of the criminal law, and, after a good deal of resistance, Fox's libel bill was passed in 1792, to settle the difficulty. I do not intend to re-open that difficulty, which I think is settled for the whole empire, by the assertion of the true principle, and I shall leave the whole cise to the jury, whether, under all the circumstances that may properly be proved, there is libel, and whether the defendants published it.

The defendants having moved, at their arraignment, for a jury composed one-half of the language of the defence, that is English, the Clerk of the Crown was proceeding to put six English-speaking jurors into the box. This was objected to by the prosecution, saying that, at the last term of the Court, it

had been declared to be irregular.

RAMSAY, J.—It was always practised when I was for the Crown, and has been usually practised since Mr Justice AYLWIN directed it to be done in a celebrated case. (1)

CARTER, Q. C., said that the Statute was changed in 1869.

RAMSAY, J.—Does the change affect this question?

CARTER, Q. C.—I think it does. It directs that there shall be two lists, one of English-speaking jurors, and the other of jurors speaking the French language, and that the names

shall be called alternately from each list.

RAMSAY, J.—I don't think it necessary for the defence to reply, as I am with them on the point. The alteration of the Statute cited seems to me an additional reason for adhering to the rule laid down by Mr Justice AYLWIN, whose rulings on the criminal law deserve respect, if any judge's do. There are now two lists, an English one and a French one, and, therefore, it is easier than it was before to give the defendence.

⁽¹⁾ On the trial of Morrison and another. Sir Louis Lafontaine would not allow it to be so done in the case of Blain, indicted for stealing a poll-book, and it was looked on at the time as a great hardship.

dants their privilege. The calling their names alternately is only a direction in calling the jury in ordinary cases, where there is no privilege claimed and no consent.

The Crown having told a juror to "stand aside," M. Devlin objected, saying that the prosecution was only nominally in the name of the Queen, and that, therefore, the right to tell a juror to stand aside did not exist.

RAMSAY, J.: This point was fully argued when I was for the Crown, and it was then determined that the right to make a juror "stand aside," existed in misdemeanors as well as in felonies. It has since been recognized by Statute (32 and 33 Vic., c. 29, sect. 38).

The six English-speaking jurors being sworn, it became necessary to call the list regularly, and the defence insisted that the Crown should now show cause, or withdraw the challenge to stand aside. On the part of the Crown, it was urged that the Crown could not be held to show cause until the whole panel was exhausted.

RAMSAY, J.: The authorities go very far in that way, and it has even been held that the list may be called over twice to see whether those who have not answered are in attendance before the Crown is called on to row cause. I shall direct the Clerk to call the names a ernately, to avoid confusion, and your challenge to stand aside will hold good till the whole panel is exhausted. I have hardly any doubt that this is the right course; but I will reserve the point if there is a conviction.

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The jury being sworn, Mr Carter took occasion to expose the law by which he purposed to be guided in this case. In doing so, he again referred to the Act of 32 Geo. III. c. 60, and argued that the question of libel or no libel was still matter of law.

RAMSAY, J.—Undoubtedly; and so it may be said of larceny and of every other offence.

Carter, Q.C., quoted Deacon to show that the judge would tell them what was a libel.

RAMSAY, J.: That doctrine will not be denied by the other side. I propose to charge the jury, just as Deacon recommends. That is to say, I shall tell them what are the constituents of libel, and leave them to find a general verdict on the whole. You seem to accept with reluctance the ruling of yesterday as to Fox's Libel Act being in force: but, in addition to its declaratory character, from the whole history of the controversy which led to it, we have our statute, (32 and 33 Vic., c. 29, sect. 33) recognizing the fact that the plea of "not guilty" puts the party accused upon any indictment, upon the country for trial, of what? Of the whole issue, in this as in every other case without exception.

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The defence put in and wished to prove two copies of the Witness, one of the 19th and the other of the 20th, to rebut malice. It was objected, on the part of the Crown, that, though parts of the same paper or book might be used, no subsequent acts of the defendants could avail them. The absence of malice must be at the time of the offence.

DOUTRE, Q. C., argued that, in a case of hemicide, the acts of the party, immediately after, would be admitted to show how the death happened, and that there was no malice, and

consequently, that there could be no murder.

RAMSAY, J.: That case occurred to me while the objection was being made. I shall take time to consider. [After conferring with Mr. Justice Sanborn.] The case is not without difficulty. But we are both of opinion that, though not very strong evidence, it should go to the jury. It seems to have been admitted in one case mentioned in Starkie, 3d. Ed., p. 714, Reg. vs. Hone.

On the same principle a tender of amends was afterwards admitted; but it appearing that it was days after legal proceedings were taken, and that it came to nothing, the Court told the jury it had no legal significance in this case to rebut

the presumption of malice.

The defence attempted to prove that rumors had existed in Montreal, prior to the 17th February to justify the articles complained of. This was objected to, and the Court maintained the objection. The truth could not be proved in justification, much less than can the defendants be allowed to prove that it was rumored to be true. The belief of defendants may be brought up by affidavit, after a motion in mitigation of punishment.

DOUTRE, Q. C.—I wish my question noted.

RAMSAY, J.—Write it yourself, and I will put it in my note book. I won't reserve it, for I am clear on that point; but you may use it on an application for a new trial. You will have plenty of time for this As there is one point reserved, there can be no sentence this term in case of conviction, and you may find some who view it differently from me.

The question was then put as follows: "Having read the articles contained in the Witness, of the 17th February, concerning the attempted suicide, please state whether the rumors contained in them, concerning Mr. Mousseau, existed in the city prior to the publication of the Witness of the seventeenth February last?"

Ruled out. Another question was put of the same nature.

RAMSAY, J.—That is the same question.

DOUTRE, Q. C.—It may be to the same effect, but it is a different question.

. Mr. DEVLIN.—We want it taken down.

RAMSAY, J.—But I won't take down any more than one question open to the same objection. I shall, however, make a note that I ruled out the evidence of rumors as a justification for the defendants, in whatever shape the

questions be put.

The following is the substance of Mr. Justice Ramsay's charge to the Jury in the above case: Gentlemen of the Jury, I regret that the learned Counsel for the defence have thought it necessary to introduce into this case a question of religion, and that they should have spent time in explaining to you a question of procedure. There can have been no object in alluding to these matters but to divert your attention from the real question before you, and to excite prejudice in your minds. Surely, it will not be contended that Protestant jurors will not do justice to a Catholic accused of an offence, or that Catholic jurors will not do justice to a Protestant on his trial. Our common experience repels the truth of such a charge. Again, you have been told that the jury was packed, and, with a strange ignorance of history, allusion has been made to the packing of juries in Ireland, as being something like the mode in which you have been selected. The packing of juries in Ireland was a very dreadful thing. There, men were brought together specially selected for their hostility to the accused. Here, in a manner strictly prescribed by law, the jurors are summoned indiscriminately from the lists of persons qualified to act, by an officer totally beyond the reach of suspicion, and who dare not, even if he desired it, alter a single name. From the sixty jurors thus summoned, you are chosen, and the mode of your selection is established not by any rule made for this occasion, but by rules which have been followed ever since I have known anything of the practice of this Court. The experience of years has regulated what privileges should be given to the Crown, and what privileges should be given to the defence, and in this case each has exercised its rights. The defence claimed the right to have one-half of the jury speaking the language of the defence, that is English, and that those six jurors should be first placed in the box. The Crown resisted this, on the ground that this practice had been declared irregular at the last term of the Court; but I upheld the ruling I had constantly seen practised here, and decided in favor of the defence, and the six English-speaking jurors were sworn. The next question was as to the right of the Crown to order jurors to "stand aside" until the panel was exhausted. Again I followed the constant practice of the Court, and this time decided in favor of the Crown; where-

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ustice Ramsay's men of the Jury, he defence have ase a question of ne in explaining n have been no to divert your ou, and to excite ot be contended e to a Catholic rors will not do mmon experience ou have been told nge ignorance of cking of juries in which you have eland was a very ogether specially Here, in a manner summoned indisfied to act, by an on, and who dare e. From the sixty the mode of your e for this occasion, ver since I have t. The experience d be given to the en to the defence, thts. The defence my speaking the d that those six ne Crown resisted d been declared out I upheld the e, and decided in a-speaking jurors the right of the til the panel was practice of the e Crown; where.

upon you are told that this is an abominable law, and that public attention only requires to be directed to it in order that it should be changed. Yet, gentlemen, we find that this practice, which was formerly only an institution of judicial creation, was formally recognized by statute, no further back than 1869. You will see then how little any such arguments as these have to do with the matter, and you will entirely dismiss them from your consideration. I now come to the real question which must occupy your attention. In my charge to the grand jury, at the opening of this term, I thus defined libel: "Libel consists in the malicious publication of an "injurious writing, printing, picture or other sign; in short, "the publication of what is injurious by more than mere words. Injurious spoken words amount only to slander, and are not generally subject of indictment." And, further on. I said: "The evidence of malice is presumed from the nature of the writing, and from the circumstances under which it was published." And, still further on, I said: "It is sufficient for our present purpose that, if you find the words "written were of an opprobrious or defamatory nature, tend-"ing to provoke the complainant to wrath, or to expose him "to hatred, contempt, or ridicule, they constitute a libel." This definition has not escaped notice; but I have not seen anything like reasonable criticism of my exposition of the law. Had there been any such, I should gladly have availed myself of it. But I believe none was possible, for I borrowed what I said from works of unquestionable authority; and, in order that you may have no doubt on this point, I shall quote from Russell, on Crimes, in support of the doctrine I laid down: "With respect to libels upon individuals, they "have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, "tending either to blacken the memory of one who is dead, " or the reputation of one who is alive, and thereby exposing "him to public hatred, contempt, and ridicule."—P. 220. But it should be observed, that there is an important distinction under this head between words spoken only, and words published by writing or printing."-Ib., p. 240. The criminal intention of the defendant will be matter of inference from the nature of the publication. In order to constitute a libel, the mind must be at fault, and show a malicious intention to defame; for, if published inadvertently, it will not be a libel; but where a libellous publication appears, unexplained by any evidence, the jury should judge from the overt act; and where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. It is a

" general rule that an act unlawful in itself, and injurious to " another, is considered, both in law and reason, to be done " mulo animo towards the person injured; and this is all "that is meant by a charge of malice in a declaration for " libel, which is introduced rather to exclude the supposition "that the publication may have been made on some innocent " occasion than for any other purpose. The intention may be "collected from the libel, unless the mode of publication, " or other circumstances, explain it; and the publisher must "be presumed to intend what the publication is likely to " produce; so that if it is likely to excite sedition, he must "be presumed to have intended that it should have that "effect."—Ib., p. 260. Now, gentlemen, examine the alleged libels, and say whether or not they are injurious. Ask yourselves whether it is injurious to accuse a married man, a person well known in the community, and upon whom every eye is at once directed, of having committed, or attempted to commit, adultery with the wife or mistress of another, and of passing his time in debauchery by indulging in orgies. A great deal of time was wasted in trying to prove whether the orgy which was renewed, was begun at the inauguration of the Hudon factory, or elsewhere. Some say the article should have one interpretation and some another; but this is really of no importance. The libel consists in alleging that Mr. Mousseau had taken part in one or more orgies, and in renewing it or them. It does not affect the case in the least where the writer intended to say this dissipation began. I don't think it is possible for any man of common intelligence to read these two articles in the Witness without arriving at the conclusion that they are highly injurious. If they are injurious, the malice will be inferred from the writing itself. You have been told, by the defence, that this law of libel differs from the law of all other offences. But this is not so. The general principles involved in the law of libel are the same as those applied to every other offence. If I do an unlawful act likely to cause death, with premeditation, it is murder, and the malicious intention is pre-umed, and so it is with libel. The only other point the prosecution had to prove was the publication by the defendants. Under our statute this is only the proof of a matter of record. The proprietors of a newspaper are obliged to make a declaration of their proprietorship, and the declaration of the defendants has been produced and proved. The case for the Crown, then, is complete unless it is contradicted by the defence. But, when we come to the defence, it is really a revolt against the law. The learned counsel complain that they have not been allowed to make their proof, that they

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have not been allowed to prove the truth of the libel, and that they have not had a fair trial, but that notwithstanding enough had leaked out (one of the counsel went so far as to boast that he had got round or evaded the ruling of the Court) to show that the libels were true. They say that the law of libel, as laid down by the Court, is a barbarous law, that the law here should not be inferior to that of England; they tell you also that you are the masters of the case, and that you can render what verdict you please, and they, in so many words, invite you to disregard the rulings of the Court in matters of law. As to the detendants not having a fair trial, no one better than the learned counsel knows that there is no foundation for their saying this. Instead of their not having a fair trial, I have admitted evidence which, so far as I can find out, has only in one case been admitted in England; and I have even gone further than in that case, and further than perhaps I should have gone, by admitting evidence of a negotiation as to tendering amends days after the arrest of the defendants. You have heard a great deal of the 6th and 7th Vic. It may be a very good law, but it is not in force here. It is an Act of the Parliament of England, passed long since we had a parliament in Canada empowered to make our own criminal law, and it has no application here. However good then that law may be, I have no power to introduce it, and if I did attempt to give it effect here, I should be a law breaker. But, even if it did exist here. it would be no protection to the defendants in this case. Their only chance of escape consists in the fact of its not being in force. If it had been in force, and they took advantage of it, they must have pleaded that the facts were true and that they were published for the public good. Had they pleaded this, they must instantly have been convicted, for they have insisted upon proving that the allegations were not true. They have produced and proved articles in their paper of the 19th and 20th, in which, in the first partially, in the last completely, they admit that the accusations against Mr. Mousseau were not true. In the tender of amends, they have carefully proved that one of the things they offered to do was to print such a retractation as Mr. Mousseau's counsel might prepare. Yet, curious to say, the complaint is now made that they have been prevented from proving the truth of the libel. And how have they repelled the accusation of malice? The defence has taken care to prove that the publication was not accidental and unknown to the defendants; but, on the contrary, that one of them added a clause to the article, and that he had revised the proof of the whole article, and, in doing so, had TOME XXIII.

amended it to suit his taste. In the paper of the 19th of February, in which is a letter from Lormier, denying the whole story that had been told, the Witness says that the accusation against Mr. Mousseau is not borne out by the testimony. Is that such a retractation as a person well disposed to Mr. Mousseau would publish? It is true, on the 20th, after legal proceedings had been taken, an article appeared saying they had obtained information assuring them that the story against Mr. Mousseau was untrue. Why did they not get that assurance before they wrote the articles of the 17th? The tender of amends here has no other legal signification than an admission of guilt. We have heard a great deal of the liberty of the press. The word liberty is so attractive that we must not allow ourselves to be led into error about it. No one objects to the press being free. That is not the matter in discussion here. There is no objection to the publication of every public event, and to reasonable and decent criticism of it. For instance, all that we are doing here, every word that falls from my mouth, is public property. It may be reported and criticised with fairness; and those who do so are only rendering a service to the public which I shall always be willing to recognize and profit by. But that is not the liberty of the press that defendants seek to establish. They wish to have it admitted that they shall have a right to publish accusations against men's private character. Then the person accused is to go hat in hand to their office and produce his proofs of innocence, which these self-constituted judges shall deal with as they think fit. They don't consider themselves bound by the fairness they experience here, where you must say "guilty or not guilty." They arrogate to themselves the right to say. the evidence is not complete, but it is not clear that you are not guilty. This is precisely what they did in this case. The article of the 19th only says that Lormier's letter did not bear out the story against Mr. Mousseau. Again, in another article which appeared after they were arraigned and had pleaded to the indictment in this case, they wrote repudiating the doctrine that men's private characters were not open to attack. Now, gentlemen, I beg of you to look carefully at the dangerous doctrine which is thus advanced as the real defence to this case. It may be that in certain cases some good might arise from making public the conduct of some notorious private impropriety; but how and where is the line to be drawn? Will men submit to this kind of investigation? There can be no doubt that, if it was once ascertained that juries would not convict for libels on individuals, men would take the law into their own hands,

aper of the 19th of ormier, denying the tness says that the borne out by the as a person well 1? It is true, on the taken, an article formation assuring was untrue. Why y wrote the articles has no other legal We have heard a e word liberty is so ves to be led into press being free. here. There is no ablic event, and to or instance, all that s from my mouth, and criticised with dering a service to to recognize and of the press that to have it admitted ecusations against ccused is to go hat roofs of innocence, deal with as they bound by the fairist say "guilty or the right to say, clear that you are did in this case. t Lormier's letter Mousseau. Again, ey were arraigned s case, they wrote e characters were eg of you to look is thus advanced be that in certain oublic the conduct how and where is to this kind of at, if it was once ict for libels on their own bands,

and the result would not only be blows with the fist, as we have recently seen here, but probably stronger measures, and we should perhaps be called on to try cases of murder because we declined to convict of libel. Which of us is so pure as to be able to suffer that the veil which covers his private life should be drawn aside to satisfy public curiosity, and who is the one without sin to perform the operation? Those who have taken credit for doing God service by blackening private character should remember the admonition, "Judge not, that you be not judged." Gentlemen, you have been told that you are not bound by my view of the facts; and this is perfectly true. You are to decide the case according to your own consciences, and you cannot make me share the responsibility with you. I have my duty, and you have yours, but it is part of mine to tell you how I view the evidence. Of it, however, you are the judges, as I am judge of the law. As I told the counsel at the beginning of the trial, the whole case is left to you, and it is for you to say whether the defendants are guilty or not. This is, however, very different from saying you can find any verdict you please. You are bound by your oath to take the law from me, and to render a verdict according to the evidence. If you neglect so to do, the burthen will be on your own consciences. As no bare question of law is ever submitted to a jury, it would be impossible to know whether you had refused to take the law from the Court, and you cannot be called to account for this; but, after all, society has no protection in courts of law but the sanctity of the oath. It is by it we are secured in the possession of our property, and in the safety of our persons, and I feel persuaded you will be bound by yours.

The Jury found a verdict of Guilty. Sentence was deferred in consequence of the reserved point mentioned above. (18 J.,

E. CARTER, Q. C., and W. H. KERR, Q. C., for the Crown. J. DOUTRE, Q. C., and B. DEVLIN, for the Defendants.

CRIMINAL PROCEDURE.

COURT OF QUEEN'S BENCH, Montreal, 22nd September, 1874.

Coram Dorion, C. J., Monk, J., Taschereau, J., Ramsay, J., and Sanborn, J.

THE QUEEN vs JOHN REDPATH DOUGALL and JAMES DUNCAN DOUGALL.

Held:—Where, to obtain six jurors speaking the language of the defence (English), the list of jurors speaking that language was called, and several were ordered by the Crown to stand aside; and the six English speaking jurors being sworn, the clerk re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, and one of those proviously ordered to "stand aside" was again called, held, that the previous "stand aside" stood good until the panel was exhausted by all the names on both lists being called.

A case reserved by Mr Justice Ramsay (vide ante, p. 472) came up for decision by the full Court. The following was the reserved case: "1st. On their arraignment, the defendants applied for a jury, one-half speaking the language of the defence, to wit: English, at their trial, which application was granted. 2nd. The defendants moved the Court that six jurors speaking the English language should first be secured and sworn. Their motion was granted, and the clerk of the Crown was ordered to verify the fact as to each juror called, whether he spoke the English language, until six jurors were sworn. 3rd. John Walker being called, and, it appearing that he spoke English, he was ordered to stand aside by the Crown. 4th. John Day having been sworn and there being then six jurors speaking the English language sworn, the Clerk of the Crown, under the instructions of the Court, re-commenced to call the panel alternately from the lists of jurors speaking the English and French languages, as provided by 32 and 33 Vic., c. 29, sec. 40 and s.s. 1. John Walker being again called, the Crown insisted that the stand aside stood, until the panel was exhausted. On behalf of the defendants, it was objected that the Crown had already ordered this juror to stand aside, and was now bound to show cause. I over-ruled the objection, as the panel had not been exhausted. I, however, reserved the point for the consideration of the Court sitting in Error and Appeal, and I now submit for its opinion: whether the Crown, under the law as it stood on the ninth day of April last, was obliged to show cause, or withdraw its challenge until the panel was exhausted. I suspended judgment after conviction, and the defendants are now on bail awaiting the judgment of this Court. Montreal, 10th April, 1874. (Signed), T. K. RAMSAY,"

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J, J., RAMSAY, J.,

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language of the detage was called, and and the six English d to call the panel lish and French lannd a-ide" was again good until the panel called.

vide ante, p. 472) he following was nment, the defenthe language of which application d the Court that ould first be secuand the clerk of ct as to each juror uage, until six jucalled, and, it apred to stand aside n sworn and there n language sworn, ions of the Court, from the lists of guages, as provid-. 1. John Walker t the stand aside pehalf of the ded already ordered d to show cause. not been exhausconsideration of I now submit for law as it stood on to show cause, or xhausted. I suse defendants are Court. Montreal,

TASCHEREAU, J., dissentiens: The defendants were indicted for libel, and stood their trial last April, before a jury. their own request, they had a mixed jury; were found guilty; but sentence was deferred until a reserved point could be brought before the Court sitting in Error and Appeal, with reference to the method adopted in the composition of the According to the exposé made by the Honorable Judge in submitting to us the question reserved by him, it would appear: First-Immediately after the first call of the jurors, the six speaking the English language having been sworn, the name of the last one being John Day, the Clerk of the Court, upon the order of the Judge, began again to call the list of the English-speaking jurors. and also that of the French-speaking jurors, in conformity with Vic. 32 and 33, c. 29, sec. 40, s.s. 1. Secondly - That, at that moment, the name of "John Walker," which had already been called, was called once more, and the Crown insisted on its right to compel him to stand aside a second-time, until the panel had been exhausted, to which the defendants objected, on the principle that the juror had been already compelled to stand aside, and that, consequently, the Crown was obliged to show cause against or for the empanelment of this juror. The Judge dismissed this objection, on the principle that the list had not been exhausted, but reserved this point for the consideration of the present tribunal. This is the question which is to-day submitted to us. It seems to me that two questions arise, to wit:—The list, was it really exhausted? and how is it it was not exhausted? and to conclude, what are the results if either of these questions are resolved affirmatively or negatively? According to the declaration of the Judge, as I read and interpret it, it would seem to me that, not only was the panel not exhausted, but that the Clerk stopped at too early a part of the panel, so soon as the six English-speaking jurors had been procured; in other terms, the bottom of the list was not reached, and the minutes in the register of the Court give proof of this important fact. I think that the Clerk ought to have received from the Court a special injunction to continue calling off the list, immediately after the last juror, "John Day," had been sworn in, taking the next name after his, and not recommencing the calling from the first name. This interruption in the calling of the panel is contrary to sec. 40, c. 29, 32-33 Vic., which says and ordains that the panel shall be alternately called from French and English jorors. The law does not say that this calling can be varied or interrupted, and recommenced at any stage of the list. If you may recommence the empaneling of the jury you have as much right to begin at any part of the panel desired.

You might even begin at the end or top of the list. The law is that the calling should be continued until the panel is exhausted, otherwise the rights of the accused party might be seriously compromised, and the Crown in private proceedings, with such an extraordinary power as it would then possess, might obtain condemnations for political offences with the greatest facility, and to the great detriment of the sound administration of justice. One could thus with the magical word "stand aside," repeated frequently, without any given reasons, eliminate the jurors considered favorable to the accused, and thus compel him, considering the limited number of jurors he would have to challenge, to accept a verdict of guilty against himself from jurors without character, or who would be known partisans of the prosecution, or of the Crown specially in a libel case. All English law is in favor of giving the accused a fair trial. The English nation prides itself, and with truth and reason, upon the liberality of its institutions in this respect; but I believe that the most distinct denial would be given to the gratulations of those who praise these institutions (at least in Canada) were we to adopt a system of selection of our jurors, such as to take away from the accused the slightest particle of his chances and means of defence. I maintain that in not continuing the calling of the jurors from the name of the last juror called, we take away from the accused the chance of finding in the following names jurors enjoying the accused's confidence and even that of the Crown; or in a word, those upright, independent, and enlightened jurors, who consider that they have to fulfil their duties in an honorable manner. If a contrary line of action be followed the law is violated, and one puts a limit to the right that the accused has of choosing from the 60 jurors which is the number of those the law declares must form the panel. The report of the case of Thomas Mansel, to be found in the eighth volume of the Queen's Bench Reports, E. & B., page 73, confirms my views on this question. In fact in that case, the juror, Ironmonger, had already been called, and had been told to stand by; the list had been exhausted; nevertheless, when the calling was once more begun, twelve jurors who had been engaged in another suit just terminated, came into Court, and the Court at once ordered that their names should be called instead of calling "Jacob Jacobs," whose name followed that of Ironmonger. Evidently the Court, which was presided over by Lord Chief-Justice Campbell, absolutely expressed the idea that before recommencing the calling of the jurors, they had to continue and to re-commence calling the list, with those who, temporarily engaged in another suit, had returned on the panel, and were therefore eligible. In the case of

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Dorion, C. J.: The question submitted to the Court is not whether the panel was called regularly. The question is whether the Crown was bound to withdraw its order to "stand aside" and show cause for challenge before the panel was exhausted. The right of the counsel for the Crown to order a juror to stand aside is not contested, but a juror having been called and told to stand aside, and his name having been called again before the panel is exhausted, does the first "stand by" still hold good? In England it has been held by Chief Justice Cockburn that the panel his only exhausted when all the jurors have answered to their names or their absence has been ascertained by calling them again. The panel is not exhausted by calling the list half way down and then returning to the beginning. I do not consider, therefore, that the panel had been exhausted in the present case. Then, as to the order to "stand aside," these words mean simply, wait until we see whether a jury can be formed without you. When the name of John Walker was called the second time, the repetition of the order to "stand aside" was not a second "stand aside," but simply a confirming of the first, until all the names should have been called to see whether a jury could be obtained. The majority of the Court are disposed to think that the ruling of Mr Justice RAMSAY was correct. The Court has nothing to do with any previous irregularity which may have occurred in calling the list, no objection having been taken

thereto by the defence.

MONK, J.: The point raised seems to me a very simple one. It is quite true a good deal has been said in the reserved case that might give rise to speculation whether the calling of the list was regular or not. We have nothing to do with that. We have to ascertain precisely what the point reserved is. It is simply whether the Court was right in maintaining a previous stand aside, until the list should have been exhausted. and no more. No objection seems to have been taken to the mode of calling the list; at all events, there is none reserved. The panel not having been exhausted, I think that the point reserved admits of no difficulty, and that it was an exercise of very considerable indulgence on the part of the learned

Judge to reserve the case at all.

Sanborn, J.: I come to the same conclusion as the majority of the Court: but I cannot think the Honorable Judge who presided at the trial intended merely to reserve the question whether a "stand aside" could be maintained till the panel was exhausted. This would be too simple. I think we must look at all that was done, as related in the reserved case. By the Consolidated Statutes L. Canada, c. 84, s. 24, in the districts of Quebec and Montreal, the sheriff is to summon one half speaking the English language and one half speaking the French language. By 32-33 Vic., c. 29, s. 40, the sheriff is required to specify in his return those jurors speaking the English language and those speaking the French language, and the names are to be called alternately from these lists. In the case reserved, it appears from the facts stated by the Honorable Judge that the jurors in the first instance were not called alternately from these lists but entirely from the English names until six jurors speaking the English language had been elected. By reason of this irregularity to elect the remaining six jurors to constitute the jury to try defendants, jurors that had been called and ordered to stand by were again called before exhausting the panel in the order determined by law. Inasmuch as the law makes a positive declaration that the jurors shall be called alternately from the list which the sheriff is required to make of those speaking the English language and those speaking the French language, and inasmuch as if the direction of the Statute had been followed in calling the jury, John Walker could not have been called a second time till the panel was exhausted, I think there was a dislocation of the jurors, and the calling of John Walker at that stage of the proceedings was unwarranted by the Statute. While it is clear that the Crown, as the law

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as the majority ble Judge who rve the question d till the panel think we must served case. By 24, in the diso summon one alf speaking the sheriff is requieaking the Enlanguage, and nese lists. In the d by the Honoce were not calrom the English sh language had to elect the retry defendants, o stand by were he order deterpositive declaly from the list se speaking the rench language, e had been fold not have been hausted, I think calling of John unwarranted by wn, as the law then stood reserve its right of challenge for cause until the panel was exhausted, and exercise its right to require jurors to stand by so long as the panel was not exhausted. I think it is equally clear, that this right of "stand by" cannot be legally exercised twice before the panel is exhausted by a continuous calling of jurors in the order required by law. The Mansel case is not like this. In that case, the reason why Ironmonger was called a second time was that it was supposed when he was called that the panel was exhausted, and the jury that had been deliberating being released before the question was determined, he was treated as if not regularly called a second time because the panel was not exhausted. It seems, by the statement of the reserved case, that the departure from the mode indicated by the Statute of calling the jury in the first instance, was accorded upon the motion of defendants. How far a consent of parties can be permitted in criminal matters against a direction of the Statute in changing a mode of trial is a delicate question. In misdemeanors, however, a waiver on the part of a defendant of any right as to the constitution of a jury has generally been held to preclude him from afterwards taking advantage of it. Bishop mentions an instance where a defendant, in a misdemeanor consented to be tried by eleven jurors, and, being convicted, the Court refused to disturb the conviction. Assuming that the defendants cannot complain of the first irregularity which was occasioned by their request, it then becomes a question whether any practical result unfavorable to the defendants could accrue by recalling the English speaking jurors that had been ordered to stand by. I am unable to discover that any privilege is lost to the defendants thereby. If these jurors had not been called a second time, the jury would have been completed from the remainder of the panel, in the same manner and with the exercise of the Crown right of stand by, of the same jurors as actually made up the jury. Under these circumstances, taking the question reserved in connection with the facts presented, I think the objection as made was properly overruled. The counsel for the defendants has referred to various incidents in the trial which the Court here cannot consider. As to the propriety of the exercise of the right of stand by, in prosecutions for misdemeanor, we are not called upon to express any opinion. The Legislature has since this trial considered it right to take away the privilege in case of libel, and it therefore cannot give rise to any question in a like case hereafter.

RAMSAY, J.: I had not intended to say anything on the point, but, after the remarks of Mr Justice Sanborn, I feel myself compelled to say a few words. I quite agree with

Mr Justice Sanborn as to the simplicity of the point reserved. That learned judge from his own extended experience must be aware how easy it is for a judge at nisi prius to be misled by a question ingeniously put. I reserved the case because it was called a second " stand by," and this struck my ear for In a matter of doubt, of course, an opportunity should be left to the prisoner to get the error corrected, and I cannot feel that my position is very ridiculous for having reserved a question seriously urged upon me by counsel of eminence. Be the question reserved difficult or not, the Court has no authority to go beyond it, and any excursion into other matters is totally uncalled for and without juris-The question is this, when a name is called a second time, no matter for what cause, before the panel is exhausted. should the first "stand by" stand or not? I could have reserved no other question because no other point was raised. One of the learned judges has said that it appears from the wording of the reserved case that the panel had not been called in the regular manner and according to section 40 of the Crim. Pro. Act. 1869. As a matter of composition I deny this. I have not stated whether it were so or not, for I do not remember, as it gave rise to no question at the trial. It was, however, totally unimportant, for no exception to it was taken at the time. It has been questioned whether this could be covered by consent. There can be no consent in a criminal case, in this sense that the law cannot be waived. For instance, even with the consent of the accused, one witness would not suffice in perjury; but no one has ever doubted that matter of procedure might be the subject of consent. tacit or express. What I did in swearing the jury was to follow the practice of the Court established by Mr Justice AYLWIN twenty-two years ago. The defendants having claimed the right to have half of the jury speaking the language of the defence, I ordered that six English speaking jurors should be secured. This was a ruling in favour of the defence. I think it a wise rule, and one I intend to follow until it is declared to be illegal by this Court in a regular manner. Six jurors being thus secured I ordered the Clerk of the Crown to go back to the point where he had begun so that the jurors who did not speak English and consequently whose names had only been called for a particular purpose might be offered for general challenge. I am not prepared to say that it might not have been perfectly legal to go on from the point where the sixth English speaking juror's name stood; but I know no law which declares the other illegal, and I think it was the fairest way to proceed, for in that way all names were presented as they came for challenge. A great

point reserved. xperience must ius to be misled e case because ruck my ear for an opportunity corrected, and lous for having e by counsel of ilt or not, the d any excursion without juriss called a second nel is exhausted, could have reoint was raised. pears from the ad not been calsection 40 of the tion I deny this. for I do not ree trial. It was, ption to it was hether this could sent in a crimiwaived. For inssed, one witness as ever doubted ject of consent, the jury was to by Mr Justice nts having claing the language speaking jurors our of the ded to follow until regular manner. ne Clerk of the begun so that sequently whose purpose might repared to say go on from the ier illegal, and I in that way all lenge. A great

deal has been said about section forty of the Criminal Procedure Act, 1869, and I am afraid what has been said is calculated to mislead. We have a difficulty in the Province of Quebec arising from the two languages which gave rise to legislation by acts applying to Lower Canada alone. When it was determined to as-imilate Criminal Procedure as far as possible, this difficulty had to be provided for, and in doing this it was enacted that the sheriff should form his panel of two lists—one of English speaking jurors and the other of French, and that the jurors should be called alternately from the lists. It is quite evident that this was directory. The sheriff cannot make an examination to find out what language a man speaks, and he judges from the name. There are many people with French names who don't speak a word of French, and with English names who don't speak English. Again, in selecting the jury it only applies to cases of ordinary occurrence when there is no special application, or no consent for a jury speaking only one language. This is clear enough from the section itself, but it becomes still clearer if we look at section 42 which preserves all local laws or practice not expressly inconsistent with the Criminal Procedure Act. Of course if the view taken by Mr Justice Tas-CHEREAU and Mr Justice Sanborn is correct, and section forty is obligatory and not directory, then the reservation of our local laws and practice is illusory. We can no longer consent to a jury of one language, and there will virtually be two juries and two trials in every case, and there will be a succesful challenge to the array or a mis-trial if inadvertently the sheriff returns a juror ignorant of the language indicated by the list on which his name appears. A result so alarming will probably prevent the adoption of this mode of interpretation which appears to me so mischievous that I feel called upon to dissent from it the instant I hear it proposed. The Statute has been in force for four years, and I venture to say it has not altered the practice in any District except in the return of town of two lists instead of one. I may further add that this forced interpretation would not have prevented the calling of Walker's name a second time, because the English list having only twenty-four names, six having been selected and sworn, the balance of the French list must have been called alternately with the jurors of the English, and till the French list was exhausted the Crown was not obliged to show cause. The defence had had full scope for its privilege by following the old practice, and the Crown must have its privilege.

The judgment is as follows: "The Court, considering that it appears by case reserved for the consideration and decision

of this Court, that at the time of the second calling of John Walker, mentioned in the case reserved the panel of the petty jury had not been all called once and was not exhausted; Considering that it does not appear by the case reserved that the order to the said John Walker to stand aside was not (sic) a second stand aside as contemplated by the law, but it was an order by the Court maintaining the first and previous stand aside until the panel be exhausted and no more; Considering, therefore, that the order of the presiding Judge was under the circumstances regular and legal, and the prosecution was not bound to shew any cause as pretended by the defence; Doth declare and adjuge that the order and ruling of the Honorable Presiding Judge, at the trial had, as stated in the reserved case, was and is according to law, and the practice of the said Court of Queen's Bench, Crown Side, and such ruling and order are hereby confirmed; Considering that judgment on the conviction in this case has been postponed; The Court doth order judgment to be rendered on the verdict against the said defendants, at some future Criminal Term of this Court, and doth further order the said defendants, to wit, John Redpath Dougall and James Duncan Dougall, to be and appear before this Court, on the crown side thereof, on Thursday, the 24th day of September instant." (18 J., p. 242.)

E. CARTER, Q. C., & W. H. KERR, Q. C., for the Crown. JOSEPH DOUTRE, Q. C., & B. DEVLIN, for the defendants.

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WRIT OF ERROR.

COURT OF QUEEN'S BENCH, Montreal, 16th September, 1876.

Coram Dorion, C. J., Monk, J., Sanborn, J., Tessier, J., and Bélanger, J., ad hoc.

JOHN R. DOUGALL et al., Plaintiffs in error, and THE QUEEN, Defendant in error.

Held:—That on a writ of error the Court cannot look beyond the record for what took place at the trial, and affidavits purporting to contradict the record are inadmissible.

2° The notes taken by the judge presiding at the trial do not form part of the record.

SANBORN, J.: This is a writ of error, and the plaintiffs in error have assigned nine reasons why they shou'd obtain relief from the judgment rendered on the 28th day of September, 1874, condemning the said plaintiffs in error, John Red-

alling of John nel of the petty not exhausted; se reserved that de was not (sic) w, but it was st and previous no more; Conding Judge was d the prosecuetended by the der and ruling al had, as stated to law, and the Crown Side, and ed; Considering has been postrendered on the future Criminal r the said defenies Duncan Doun the crown side ber instant." (18

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TESSIER, J., and

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the plaintiffs in hou'd obtain reday of Septemerror, John Red-

path Dougall and James Dougall, to pay severally, to wit, John Redpath Dougall sixty dollars, and the said James Dougall forty dollars, to Her Majesty, upon a verdict rendered against them for libel. The first reason assigned is because their motion for a new trial was rejected. Without deciding whether, under the existing law and the constitution of the Queen's Bench, Crown side, the Court could under any circumstances entertain such motion, it is sufficient to say that all the grounds urged in support of the motion, except one. are alleged illegal rulings of the presiding judge upon matters of evidence. Section 80 of our Criminal Procedure Act expressly declares that: "No writ of error shall be allowed in any criminal case unless it be founded on some question of law which could not have been reserved, or which the judge presiding at the trial refused to reserve." It is not stated in the motion for a new trial that the Judge refused to reserve any of these questions, and we cannot take cognizance of them. Further, the notes of evidence are not before us, and we have no means of judging upon the rulings. As to the other ground of motion, that the verdict was not one of "guilty" but "not guilty," it is not proved by the record before us. The 2nd, 3rd, 4th, 5th, 6th and 7th reasons assigned have reference to alleged illegal rulings of the presiding Judge on question of evidence. In fact, they are a repetition of the reasons given for the motion for a new trial. It is simply impossible for this Court to give any opinion upon these rulings as we are not in possession of the notes of evidence taken at the trial, and there is nothing in the record to show that such rulings were made. The eighth reason assigned is that the verdict was not that of "guilty" but "not guilty." The record shows nothing but a verdict of "guilty." We cannot look at the affidavits of persons as to what took place at the trial. The record is the only authentic account of it and the only thing by which we can be guided. The ninth ground is that the honorable Judge presiding refused to reserve any of these questions raised as to evidence, although requested in writing This is a matter that might be considered under a writ of error, as is implied by the 80th section of the Criminal Procedure Act to which reference has been made. Court, however, can only ascertain that such request was made, by reference to the record sent up, and can only determine upon the reasonableness of the refusal, by proof of tender of such evidence as was alleged to have been ruled out. The record, as sent up to us, does not establish these facts. It is plain. then, as the Court upon writ of error can only consider what appears upon the face of the record, it has nothing to act upon. The allegations contained in the several reasons assigned for re-

versal of the judgment, so far as the record proves them, are unfounded. It is first to be observed that this Court, in adjudicating upon a writ of error, has no appellate jurisdictionand it is a well-settled doctrine that in error the Court only takes cognizance of what appears on the face of the record. Rex vs Faderman, 4 New Sess. C., 161; Archbold, p. 186. Mellish vs Richardson, 2 M. & Scott, 191; Duval dit Barbinas vs Reginam, 14 L. C. R., 71 (1). Whelan vs Reginam, 28 U. C. Q. B., 139. As to what should constitute a record, there is great uncertainty. Bishop says (1 Procedure 1,153): "There is no subject relating to the law of criminal procedure upon which it is so difficult to set down anything as positive law as the subject of the record." Chitty sums up the contents of a record in a case of felony as follows: "It states the session of Over and Terminer, the commission of the judges, the presentment by the oath of the grand jurymen by name, the indictment, the award of the capias or process to bring the offender, the delivery of the indictment into Court, the arraignment, the plea, the issue, the award of jury process, the verdict, the asking of the prisoner why sentence should not be passed on him, and the judgment." 1 Chitty, Criminal Law, 720. This subject was fully discussed in the case of Barbinas vs The Queen, decided by this Court in 1863, and four out of the five judges appear to have been of the opinion that the notes of evidence of the presiding Judge form no part of the record. This dictum is in accordance with Chitty. Speaking of judge's notes he says: — " In order to enable the presiding judge to sum up the evidence with accuracy to the jury, he ought to take notes of the proofs adduced in every part of the proceedings. And this is the more necessary, as these minutes frequently become important documents in a remoter stage of the prosecution, as where the cause is removed by certiorari before sentence, where a special case is carried up to the Court above or where an application is made for a pardon. In these and many other cases these notes are examined to show the circumstances of the prisoner's guilt and how far the aggravations or excuses of the case ought to operate in dispensation of justice or extension of mercy." 1 Chitty, Crim. Law, 633.

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⁽¹⁾ L'accusé, trouvé coupable de meurtre, ne peut demander, par bref d'erreur, que le rapport d'une analyse faite par un médecin sur l'ordre de la cour et que celle-ci a jugé à propos de ne pas communiquer aux jurés, soit produit au dossier, par le motif que, s'il eût été communiqué aux jurés, ce rapport eût fait partie de la preuve et que ni les témoignages ni les décisions du juge qui y sont relatives ne peuvent être soumis à l'examen du tribunal d'appel, le bref d'erreur ne s'expédiant que pour des erreurs évidentes dans le jugement ou dans les procédures portées sur le registre du greffe. (Duval dit Barbinavs La Reine, C. B. R., en appel, Justice Criminelle, Québec, 19 décembre 1863, LAFONTAINE, J. en C., DUVAL, J., MEREDITH, J., MONDELER, J., dissident, et BADGLEY, J., 14 D. T. B. C., p. 52, et 12 R. J. R. Q., p. 250.)

proves them, are Court, in adjuate jurisdictionthe Court only ce of the record. Archbold, p. 186. val dit Barbinas Reginam, 28 U. a record, there is 1,153): "There procedure upon as positive law the contents of a tes the session of dges, the presentname, the indictring the offender, the arraignment, s, the verdict, the not be passed on l Law, 720. This Barbinas vs The our out of the five that the notes of art of the record. peaking of judge's residing judge to ary, he ought to rt of the proceednese minutes freremoter stage of ved by certiorari d up to the Court pardon. In these ned to show the far the aggravain dispensation Crim. Law, 633.

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tribunal d'appel, le
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(Duval dit Barbinas
Québec, 19 décembre
MONDELET, J., dissiR. Q., p. 250.)

The judge's notes remain with him. The procedure that forms part of the record is what is entered by the clerk. According to Bishop, it is greatly in the power of the presiding judge to control the record, and it would seem by the terms of the 80th section of the Crim. Pro. Act, if any question is sought to be reserved and the judge declines to reserve it, that it may be put on record and form part of the record to be taken cognizance of under writ of error. It was held in Rex vs Carlisle. Q. B. and Ad., 362, that matter of record must be proved by the record itself, not by anything aliunde. It is not necessary or pertinent for the Court to pronounce any opinion upon the questions presented by the reasons assigned by the plaintiffs in error. It would be adjudicating upon abstract questions, so far as the record gives us any information, for the Court can only determine this demand in error upon what appears upon the face of the record. The record as certified by the Clerk shows no defect in substance or irregularity of procedure in the trial and judgments to warrant a reversal of the judgment complained of, and the reasons assigned generally appear not to be founded upon facts of record, consequently the judgment must be affirmed. (22 J_{\odot} p. 133.)

DOUTRE & Co., for the plaintiffs in error. CARTER, Q. C., and KERR, Q. C., for the Crown.

NOUVEAU PROCES EN MATIERE CRIMINELLE.

COUR DU BANC DE LA REINE, JURIDICTION CRIMINELLE,

Montréal, 28 septembre 1874.

Présent: RAMSAY, J.

LA REINE vs John Redpath Dougall et James Duncan Dougall.

Juge: Que la Cour du Banc de la Reine, juridiction criminelle, présidée par un seul juge, n'est pas compétente pour accorder un nouveau procès.

PER CURIAM: This is an application for a new trial, on the ground that the former trial was a nullity, or, in technical language, it is an application for a venire facius de novo. The first six grounds in support of the motion are really grounds, if well founded, for a new trial, and the whole motion was presented to the Court as simply a motion for a new trial. So far as the form goes, it is of little moment, for

the grounds being for a new trial, it equally suggests the difficulty which, at once, suggested itself to my mind, as to whether such a motion could be adjudicated on by me here on the merits. On this point, counsel were heard, and I have now to deliver the opinion of the Court on this preliminary point. In support of the jurisdiction, it was argued that Section 80 of the Criminal Procedure Act of 1869, ch. 29, only abolished the statutory regulations with regard to new trials, leaving the common law right as it stood, or as Mr. Clarke has put it, in his useful work on the Criminal Law of Canada. "The Statutes authorizing the granting of new trials, in criminal cases, have been repealed, and, now, throughout the Dominion, there is one uniform law, similar to that of England, on this point." It is further said that section 71, of cap. 77, C. S. L. C., gives to one or more Judges of the Court of Queen' Bench, sitting on the Crown side, the power of the Court; and that it has been always so practiced. The cases of Notman, Coote and Daoust were mentioned in support of the practice. In answer, it is said, at common law, in England, no such power exists in a Court of Oyer and Terminer and general gaol delivery; that the power, if it exists at all, lies in the Court of Queen's Bench sitting as a Court of Error, and, further, that Section 80 of the Criminal Procedure Act sweeps away, by implication, all right to a new trial, except for nullity. It is not necessary for me to decide the larger question, as to whether any new trial exists, except for cause of nullity in the former trial, for I am clearly of opinion that, sitting here, I cannot grant a new trial for any of the six causes first set forth in the motion. The mc t I could do would be, in my discretion, to respite judgment, in order that you might have an opportunity to move the court in banco for a new trial. Section 71, c. 77, C.S. L. C., evidently only refers to the full power of the side of the court. This seems clear from the context; but Section 72 says this in so many words. Were I to decide otherwise, on the naked words of Section 71, I should have to say that one judge, sitting as the Crown side, would have the full powers of the whole court of Queen's Bench, for all purposes, this would be an absurdity. In a case reported in the L. R., 3 P. C. cases, at p. 435, such an interpretation is negatived. It was there held that letters reflecting on a judge, whilst acting as a judge of the Court of Queen's Bench, under Cap. 95, C. S. L. C., could only legally and properly be taken before the full Court of Queen's Bench." The cases cited decide nothing as to the question before us. One, where the new trial was granted, was overruled before the full court. In the other two, the motion was not allowed. With regard to the last

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ground, it is totally without precedent. There is no case to be found which ever permitted the contradiction of a matter of record, that is of what took place in face of the court, on affidavit. Besides this, it is proper to add that the affidavits do not cover the transaction, even if they were admissible, and they do not relate what passed according to my recollection. After the facts referred to in the affidavits, the Clerk of the Crown put the question, in French and English, and received the verdict, which was enregistered, and the record to all intents and purposes, in accordance with fact. One could hardly have any better evidence of the danger of admitting testimony of this kind, against the record, than the affidavits produced. The motion is therefore rejected.

Mr DOUTRE handed in the following motion: "The defendants respectfully request the Court to reserve, for the consideration of the Court of Queen's Bench, sitting in Error and Appeal, the questions involved in their motion for a new trial; and also the question as to their right to be heard on said motion before this Court, and as to the jurisdiction of this Court in the said matter; the said Court having declared that it has no jurisdiction to intertain the said motion no

matter how well founded.

Judge Ramsay, then addressing the defendants, said: — I am very sorry to be obliged to pass sentence in this case, but my duty is clear. It is perhaps unnecessary that I should make any suggestion as to the course you might have adopted. There is a case recently decided in England which would suggest to any body the proper course to pursue in such a case as yours. A great deal has been said about the verdict of the jury, but my impression is that it is the only verdict which men under oath could give. I think the jury could have brought in no other verdict. There was room, then, for you to have taken a different course from what you did. Had you submitted affidavits to the Court, attesting your good faith and want of malice, I should have been at liberty to accept bail from you and dismiss you, but you saw fit to take a different course, and I am, therefore, obliged to pass a sentence which will not be merely formal. At the same time I am perfectly well aware that the habits of this country have been to use the press in the most reckless manner, and, consequently, as yours is the first case that comes up in this form, it is necessary that I should take into consideration the habits of the country, which are very unfortunate. However, I would draw your attention to one fact. An idea has gone abroad that the recent changes in the libel law are of a nature to render prosecutions of this kind less likely to succeed, I entirely differ from those who think so. In my judgment, the changes render the law much more stringent. I make a distinction between John Redpath Dougall, who wrote part of the article and James Duncan Dougall, the other defendant. The sentence of the Court is that you, John Redpath Dougall, shall pay a fine of \$60, and, in default of payment, to remain in prison till it is paid; and that you, James Duncan Dougall, pay a fine of \$40, under a like alternative." (6 R. L., p. 578.)

DOUTRE & Co., for plaintiffs. CARTER & KERR, for the Crown.

CERTIORARI.

COURT OF QUEEN'S BENCH, IN CHAMBERS, Montreal, 11th March, 1874.

Coram RAMSAY, J.

REGINA vs C. J. BRYDGES.

Held:—An order having been granted, under 32 and 33 Vict., c. 29, s. 11 (1869), changing the place of trial from Quebec to Montreal, and ordering that the inquest and all the proceedings had before a corone should be transmitted to the Court of Queen's Bench at Montreal, and such order for transmission of inquest having been obeyed, a writ of certiorari to produe the return of proceedings before a judge of the Court of Q. B. in Chambers, in order that the inquest may be quashed for illegality, is unnecessary, and a petition presented in Chambers praying for the issue of such writ of certiorari, will not be granted.

RAMSAY, J.: The coroner of the District of Quebec held an inquest on the body of a man called Pierre Cauchon, who was killed by a train of the Grand Trunk Railway in that district. It appears that the jury found that he came to his death by the culpable negligence of the Managing Director of the Grand To ak Railway Company of Canada, and, thereupon, the coroner issued his warrant. In virtue of this warrant. Brydges was arrested, and brought before Mr Justice BADGLEY, who bailed him. On Brydges' own affidavit, declaring that he could not have a fair trial in the District of Quebec, Mr Justice Badgley ordered that the trial should take place in Montreal, and that the inquest and all the proceedings should be transmitted to the Court of Queen's Bench, at Montreal. The order was given under the authority of the 32 & 33 Vict., cap. 29, sec. 11, (1869). The 27th of last month, a petition setting forth these facts was presented to me in Chambers, alleging, moreover, that the coroner had returned the inquest before the Court, in Montreal, and praying for the issue of a writ of certiorari, to produce the coroner's inquest before me,

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March, 1874.

nd 33 Vict., c. 29, s. o Montreal, and orad before a coroner at Montreal, and en obeyed, a writ of lefore a judge of the st may be quashed sented in Chambers ot be granted.

Quebec held an fauchon, who was ty in that district. to his death by Director of the and, thereupon, of this warrant, Justice Badgley, t, declaring that ct of Quebec, Mr uld take place in roceedings should ich, at Montreal. the 32 & 33 Vict., month, a petition ne in Chambers, arned the inquest for the issue of a nquest before me, in order that the same should be quashed, inasmuch as it does not appear, by the said inquest, that any offence had been committed by the accused. The further hearing of this petition was deferred till the 9th instant, and, in the meantime, notice was served on the solicitor general, and on the coroner. The Crown was represented by Mr Mousseau; the latter did not appear. On the part of the petitioner it was held, first, that a judge, in Chambers, out of term, may, by his flat, order a writ of certiorari to issue; second, that an inquest may be quashed for illegality, and that even in chambers; and, 3d, that it is the constant practice, in England, to issue a certiorari, either by order of the Court or under the judge's hand, that is by fiat in vacation. The English practice referred to has no application in the present case. In all the cases cited, where a writ of certiorari was granted, in England, it will be seen that it was used to transfer a record from one Court to another, and not to make a record, as was suggested. Thus, take the practice as to inquest. In England, they are returned to the Assizes, and, if it is required to amend one, to quash it, or to refer to it, in any way, in the Queen's Bench, it can only be brought up by certiorari, issued on the order of the Court, or by judge's flat in vacation. The order or flat requires the "clerk, in Court," to issue the writ addressed to the custodian of the record, enjoining him to certify the same into the Queen's Bench. There is no instance of a certiorari being issued, at the Assizes, to bring up the record, when the coroner has actually returned it, although it is the usage to quash illegal inquests at the Assizes. See Patteson, J., in re Culley, 5 B. & A., p. 232. In the present case, the record is in a position similar to an inquest returned to the assizes. It is already within my reach, and it is neither necessary, nor possible for me, to proceed as a judge of the Court of Queen's Bench would do sitting in Chambers, in London. The writ of certiorari is not necessary to enable me to see the record, and, if I desired to issue such a writ, there is no one to whom I could order it to be addressed. This will appear clear by following out the proceedings I am invited to enter upon. If I were now to make my flat, I must address it to the clerk of the Crown, and enjoin that officer to issue a writ of certiorari addressed to himself ordering himself to give himself the record. What would be gained by this circumlocution? It is due to the organization of our C arts that the writ of certiorari is not in use in this Province. I am not, however, prepared to say that there are not many cases in which it should be used and is not, owing to a very loose practice, but evidently, this is not one of those cases. The prayer of the petition is only

that a certiorari should issue, and, therefore, it might be sufficient symply to order that the petitioner should take nothing by his petition; but, as the ruling goes no further than to say that the certiorari is not necessary, I may as well intimate to counsel, in order to save the accused trouble and expense, that I should not feel disposed to entertain any application to quash the inquest, in Chambers, so near the opening of the term on the Crown side. In speaking thus, I wish it to be distinctly understood that I express no opinion as to whether a judge in Chambers has or not the power to quash an inquest. (18 J., p. 94.)

CARTER, Q. C., and MACRAE, for petitioner.

MOUSSEAU, Q. C., for the Crown.

HYPOTHECARY ACTION .- TRANSFER .- SIGNIFICATION.

SUPERIOR COURT, Montreal, 27th September, 1873.

Coram TORRANCE, J.

GIBEAU vs DUPUIS.

Held:—That the article C. C. 1571 does not apply to an action founded on a transfer without signification, where the only plea is that the defendant is not proprietor. (C. C. P. 144.)

PER CURIAM: This is an hypothecary action, for \$200. issued 13th December, 1862. The plea was that the defendant was not proprietor, but only occupant, that the land had always belonged to Emélie Bro dite Pominville, deceased, now represented by her four children, Alfred Gariépy, Tancrède Gariépy, Ludger Gariépy and Hermine Gariépy: "Que les faits ci-dessus énoncés étaient connus du demandeur, lors de l'institution de la présente action, et que le demandeur devait porter son action, non pas contre le défendeur en cette cause, mais bien contre les dits propriétaires." This is the sole issue between the parties, whether defendant was in possession as proprietor. The defendant has admitted, when interrogated on faits et articles that he had been in possession twentyseven years, and that he had always paid the taxes, which were laid upon this land, but that he had not any title. There has been no signification of the transfer upon the defendant, who relies upon Forsyth & Charlebois, 13 L. C. Jur., 328, and 17 R. J. R. Q, p. 541, and contends that there having been no signification of the transfer under which plaintiff holds the debt, he has no action. C. C. 1571. The answer to

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action, for \$200, that the defenthat the land had le, deceased, now ariépy, Tancrède riépy : " Que les mandeur, lors de lemandeur devait ur en cette cause, s is the sole issue s in possession as hen interrogated ossession twentythe taxes, which ad not any title. fer upon the deis, 13 L. C. Jur., that there having r which plaintiff The answer to

this is that the defendant has only pleaded that he was occupant and not proprietor, and that plaintiff should have directed his action against the proprietor whom he designates. The defendant here admits that the plaintiff had an action, and he does not plead any other plea. Having pleaded one sole ground of defence, he has waived all others. C. C. P. 144. The plaintiff is, therefore, on the whole, entitled to the conclusions of his declaration. Judgment for plaintiff. (1) (18 J., p. 101.)

MEDERIC LANCTOT, for plaintiff. E. ROBIDOUX, for defendant.

CAUTIONNEMENT D'UNE PERSONNE CONVAINCUE PENDANT UN CAS-RESERVE.

COUR DU BANC DE LA REINE, EN APPEL, Montréal, 12 décembre 1871.

Présents: DUVAL, J. en C., CARON, J., BADGLEY, J., DRUM-MOND, J., MONK, J. dissident.

LA REINE vs COOTE.

Jugé:—Que le montant du cautionnement d'une personne convaincue en attendant la décision d'un cas réservé peutêtre fixé et le cautionnement reçu par un juge en chambre.

Un point de droit ayant été réservé, le prisonnier convaincu d'incendiat, fut admis à caution par la Cour (BADGLEY, J.); mais le montant du cautionnement ne fut pas fixé. Le cau-

(1) The judgment was confirmed in Review, 31st March, 1874, Johnson, Mackay, Beaudry, Justices. Johnson, J., for the Court, said:—The plaintiff is the "cessionnaire" of La Banque du Peuple, and brings an hypothecary action against the defendant, for \$200, under an obligation executed by Emile Bro dite Pominville, and which hypothecated several parcels of real estate, of one of which the defendant is alleged to be in possession, as "detenteur." By his plea, the defendant not admitting, but also not at all denying the other allegations of the action, contents himself with saying that he is not proprietor of the lot; but that it belongs to the heirs of Emelie Bro dite Pominville, and asks for the dismissal of the action. This is the sole point in contestation; and every other fact alleged is, under the positive terms of the law, held to be admitted, if not expressly denied or declared to be unknown. There can, therefore, be no question here, as was suggested in argument, of the necessity of signification of the transfer. Upon the only point in issue, then, the defendant examined on "faits et articles" admits that he is in possession for the last twenty-seven years, that he pays no rent, but pays the taxes, and is inscribed on the municipal roll, and has never been troubled in his possession. The judgment inscribed against was rendered contrary to the defendant's pretensions, and we think rightly, and should be confirmed, with costs in both courts.

tionnement fut pris et fixé par un juge en chambre. Sur motion de la Couronne que le cautionnement soit déclaré nul, et que le prisonnier soit ré-incarcéré: Jugé que le cautionnement était régulier et valide, DUVAL, J. C., CARON, BADGLEY et DRUMMOND, JJ. Contra MONK, J., qui était d'opinion que le cautionnement n'aurait dû être donné, fixé et pris que par la Cour, et non par un juge en chambre. (3 R. L., 439; 2 R. C., p. 106.)

Law of Lower Canada.—Felony.—Evidence.—Depositions taken on Oath before Trial on a criminal charge.—New Trial.—Canadian Statute, 32 & 33 Vict., c. 29, s. 80.—Practice.—Leave to appeal in a criminal case.

PRIVY COUNCIL, 18th March, 1873.

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On appeal from the Court of Queen's Bench for the Province of Quebec, Canada.

Present: Sir James William COLVILE, Sir Barnes PEACOCK
The Lord Justice Mellish, Sir Montague Edward
SMITH, and Sir Robert Porrett Collier.

OUR SOVEREIGN LADY THE QUEEN, appellant, and EDWARD COOTE, Respondent.

According to the English law, introduced into Lower Canada at the time of the cession of Canada to England in 1763, and unaffected by subsequent Canadian or Imperial Statutes, the depositions on oath of a witness legally taken are admissible evidence against him, if he is subsequently tried on a criminal charge. The only exception is, in the case of answers to questions which he objected to when his evidence was taken as tending to criminate him, but which he has been improperly compelled to answer. A was indicted for clony. At the trial the Crown put in evidence depositions sworn to by him, without being cautioned that what he so deposed to might be given in evidence against him, before Fire Commissioners empowered by the Quebec Statutes 31 Vict., c. 32, and 32 Vict., c. 29, to investigate the origin of any Fires occurring in Quebec, and before any charge or accusation had been made against him, Held: that the depositions were properly admitted as evidence against the Prisoner at the Trial.

Semble:—Chap. 77, s. 63, of the Consolitated Statutes of Canada, giving the Court of Queen's Bench power to direct a new trial, is repeated by the Canadian Statute, 32 & 33 Vict., c. 29, s. 80

On petition by the Attorney-General of the Province of Quebec, special leave to appeal granted from a judgment of the Queen's Bench, Quebec, on a case reserved in a Trial for Felony.

In this case special leave to appeal was granted from a judgment of the Court of Queen's Bench of the Province of Quebec, Canada, on a case reserved for that Court by Mr

nbre. Sur modéclaré nul, et le cautionneron, BADGLEY d'opinion que et pris que par L. 439; 2 R. C.,

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ranted from a e Province of Court by Mr Justice BADGLEY, under the powers of the Consolidated Statutes of Lower Canada, c. 77, ss. 57 and 58 (1) on a trial of the Respondent for Arson.

The case so reserved by Mr Justice BADGLEY was as follows: "The prisoner, Edward Coote, was indicted for arson of a warehouse in his occupation, and belonging to Alexander Roy. The indictment contained four counts,—The first with intent to defraud the Scottish Provincial Insurance Company; second, to defraud the Royal Insurance Company; the third to defraud generally; and the fourth to injure generally; upon his plea of not guilty, he was tried before the Court of Queen's Bench, at the criminal term of the said Court, holden by me, at Montreal, in this present Month, before a competent jury empanelled in the usual manner, and after evidence adduced by the Crown and by the prisoner, was found guilty the jury returning a general verdict of guilty. In the course of the adduction of the evidence for the crown, two depositions made and sworn to by the prisoner, with his signature subscribed to each, taken by the Fire Commissioners (2) at their investigation into the cause and origin of the fire at his warehouse, before any charge or accusation against him or an; other person had been made were produced in evidence against him, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection previously made by the prisoner to their production

- (1) By the Consolitated Statutes of Lower Canada, c. 77, s. 57, it is provided that "when any person has been convicted of any Felony at any Criminal Term of the Court of Queen's Bench, the Court before which the case has been tried, may, in its discretion, reserve any question of law which has arisen on the trial for the consideration of the Court of Queen's Bench on the appeal side thereof, and may thereupon postpone the judgment, until such question has been considered and decided by the said Court of Queen's Bench." By sect. 58, "the said Court shall thereupon state, in a case, to be signed by the presiding Judge, the question or questions of law, with the special circumstances upon which the same have arisen. S.-S. 2: The said Court of Queen's Bench shall have full power and authority, at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine any question therein, and thereupon to reverse, amend, or affirm any judgment which has been given on the indictment, on the trial whereof such question arose, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said Court of Queen's Bench the party convicted ought not to have been convicted, or to arrest the judgment, or to order the judgment to be given thereon at some other Criminal Term of the said Court, if no judgment has before that time been given, as the said Court of Queen's Bench is advised, or make such other order as justice requires."
- (2) The Fire Commissioners, before whom the depositions were taken, were appointed under the Statutes of the Provincial Legislature of Quebez, 31 Vict., c. 32, and 32 Vict., c. 29. In pursuance of those Statutes they were empowered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses, and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause.

in evidence, and after his said objection had been overruled by me-after the conviction of the prisoner, and before sentence was pronounced by me thereon, he moved the court by two motions filed in court in the terms following:" The case then set out the two motions, of which the first is immaterial. as Badgley, J., rejected it, and reserved no question respecting it; the second was in the following terms: "Motion on behalf of Edward Coote, that judgment upon the said indictment, and upon a verdict of guilty thereon, rendered against him, be arrested, and that the said verdict be quashed and set aside and the said Edward Cooke be relieved therefrom, for, among others, the following reasons:" A great many reasons were then set, the only ones material to the present appeal being, that the two depositions were inadmissible in evidence because the Fire Commissioners before whom they were taken had no authority to administer an oath, or take such depositions, and such depositions were not admissible as statements made by the prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an oath. The case then stated the rejection of the first motion, and that the Judge, though himself considering the reasons given insufficient to support the second motion, yet, as doubt might be held by the Court of Queen's Bench as to the legal production of the deposition, reserved it, and held it over for decision with reference to the admission of the depositions by the Court of Queen's Bench. reserved case came on for argument in the court of Queen's Bench, appeal side, before the Chief Justice DUVAL, and the Justices Caron, Drummond, Badgley and Monk; and on the 15th of March, 1872, the Court gave judgment in the following terms: "After hearing Counsel as well on behalf of the prisoner as for the Crown, and due deliberation had, on the case transmitted to this Court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered adjudged, and finally determined by the Court now here, pursuant to the Statute in that behalf, that an entry be made on the Record to the effect, that in the opinion of this Court the production of the depositions made by the prisoner before the Fire Commissioners at Montreal was illegal, and, therefore, that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set aside. But this Court considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, EDWARD COOTE, be tried anew on the Indictment found and now pending against him, as if no Trial had been had in the case; and that for the purpose of standing such new

een overruled nd before send the court by ng:" The case t is immaterial, tion respecting otion on behaif id indictment, d against him, ed and set aside rom, for, among y reasons were t appeal being, in evidence behey were taken ake such depole as statements ot made freely ar, and without ed the rejection h himself conort the second ourt of Queen's sition, reserved e to the admis-'s Bench. The ourt of Queen's DUVAL, and the NK; and on the ent in the folloll on behalf of eration had, on ourt of Queen's it is considered ourt now here, n entry be made of this Court prisoner before , and, therefore, Sovereign Lady s hereby quashthat the conlepending upon the said pridictment found

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Trial he be bound over in sufficient recognizance to appear on the first day of the next ensuing term of the Court of Queen's Bench, sitting on the Crown side, at Montreal, and thereafter, from day to day, until duly discharged." From this judgment the Justices Baddley and Monk dissented. The prisoner was discharged on his recognizance to appear on a new Trial. And application made by the Attorney-General for the Province of Quebec, to the Court of Queen's Bench, for leave to appeal to Her Majesty in Council from this judgment, was refused. A petition was then presented by the Attorney-General of Quebec to the Queen in Council praying for special leave to appeal from the above judgment. The petition was heard by the judicial Committee on the 30th of April, 1872.

Sir R. PALMER, Q. C., and Mr H. M. BOMPAS, for the peti-

Their Lordships granted the application; and by an Order in Council, dated the 10th of May, 1872, special leave to appeal from the judgment of the Court of Queen's Bench of the 15th of March, 1872, was granted. As no appearence was entered for the respondent, the appeal was heard ex-parte.

Sir John Karslake, Q. C. (M. H. M. Bompas with him), for the Appellant: This case is governed by English Law. The Criminal Law of England was introduced into Canada at the time of the cession of Canada to England in the year 1763, and the Criminal Law of England at that time still continues in force, except so far as it has been altered by Canadian or Imperial Statutes applicable to Canada. Statutes of Quebec, 31 Vict., c. 32, ss. 3, 4, 5, 6, 7 and 8. Our contention is, that the depositions of the prisoner were properly received in evidence by the Judge before whom the indictment was tried. The Fire Commissioners before whom the depositions were taken, had under the Provincial Statutes, 31 Vict., c. 32, and 32 Vict., c. 29, power to compel the attendance of witnesses, to examine them on oath and also to commit for contempt. Such depositions were admissible in evidence against the prisoner, although made on oath by him as a witness whose attendance might have been compelled, and without caution that his statement might be given in evidence against him: Russell on Crimes, Vol. III, p. 418 [4th Ed.], where the cases are collected; Taylor on Evidence, Vol. I., p. 743 [3rd Ed.]; Roscoe's Criminal Evidence, p. 62 [7th Ed.]; Joy on Confess., pp. 62, 68; Reg. v. Garbett (1); Rex v. Lewis (2); Rex v. Haworth (3); Reg. v. Goldshede

⁽¹⁾ Den. C. C., 236.

^{(2) 6} C. & P., 161.

^{(3) 4} C. & P., 254.

(1); Reg. v. Sloggett (2); Reg. v. Chidley and Commins (3); Reg. v. Gillis (4). There was no substantial ground for moving an arrest of judgment, nor had the Court power to award a new trial. Chapter 77, s. 63, of the Consolidated Statutes of Lower Canada, gave the Court of Queen's Bench power to direct a new trial; but that Statute was repealed by a subsequent Statute, 32 & 33 Vict., c. 29, s. 80, which section contains no power authorizing the Court of Queen's Bench to grant a new trial in a criminal case.

At the conclusion of Sir John Kurslake's argument their Lordships intimated that, if necessary, they would call on M. Bompas. He was not called on, and judgment was now deli-

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vered by SIR ROBERT P. COLLIER:

EDWARD COOTE, the respondent, was convicted of arson, subject to a question of law reserved by BADGLEY, J., (the judge who presided at the trial), for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of c. 77, sect. 57 of the Consolitated Statutes of Lower Canada. The question reserved was, whether or not the prosecutor was entitled to read as evidence against the prisoner depositions made by him under the following circumstances:—An Act of the Quebec Legislature appointed officer named "Fire Marshals" for Quebec and Montreal respectively, with power to enquire into the cause and origin of fires occuring in those cities, and conferred upon each of them "all the powers of any judge of session, recorder or coroner, to summon before him and examine upon oath all persons whom he deemed capable of giving information or evidence touching or concerning such fire." These officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a justice of the Upon an enquiry held, in pursuance of this statute, as to the origin of a fire in a warehouse of which Coote was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the records, but their Lordships accept the following statement of BADGLEY, J., as to the circuinstances under which they were taken: "Among the several persons examined respecting that fire was Coote himself, upon two occasions, at an interval of three or four days bet-

^{(1) 1} C. & K., 657.

⁽²⁾ Dears. C. C., 656.

^{(3) 8} Cox's C. C., 365.

^{(4) 17} Ir. C. L. Rep., 512.

Commins (3); ound for moower to award ed Statutes of neh power to aled by a subh section conen's Bench to

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cted of arson, DGLEY, J., (the leration of the pursuance of ower Canada. the prosecutor risoner deposinstances :—An named "Fire ly, with power curing in those the powers of summon before om he deemed ching or conwer, if the evibelieving that spected person, and committal a justice of the f this statute, ich Coote was ness. No copy heir Lordships , as to the cirnong the seve-Coote himself, four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and which was attested by the commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his previlege of refusing to answer such questions. Some days after the date of the latter deposition, and after the final close of the inquiry, Coote was arrested upon the charge of arson of his premises and duly committed for trial." At his trial the above mentioned depositions were duly proved, and admitted in evidence after being objected to by the counsel for the prisoner. The objection taken at the trial appears to have been that to constitute such a court as that of the Fire Marshal was beyond the power of the propincial legislature, and that consequently the depositions were illegally taken. Subsequently, other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held, by the whole court (in their Lordships' opinion rightly), that the constitution of the court of the Fire Marshal with the powers given to it, was within the competency of the provincial legislature; but, it was further held, by a majority of the court that the depositions of the prisoner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be taken in evidence against him, after the manner in which justices of the peace are required to caution accused persons, by an Act of the British Parliament adopted in this respect by the Colonial Legislature. The Court held the conviction to be bad, but inasmuch as the objection to it was not founded on the merits of the case, made an order directing a new trial. Their Lordships are unable to concur in what appears to be the view of one of the judges of the Court of Queen's Bench, that the law, on the subject of the reception in evidence against a prisoner of statements made by him upon oath, is so unsettled that every judge is at liberty, in every case, to act upon his own individual opinion. It is true that doubts have from time to time arisen on this subject, and that conflicting dicta and indeed decisions may be found upon it; but, in their Lordships' opinion, all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been if properly understood. In the case of Rex vs Haworth, 4 C. & P., 254, a deposition on oath made by the prisoner as a witness against a person named Shearer, on a charge of forgery, was received in evidence by Park, J., against the prisoner, on an indictment of forgery. In Reg. v. Goldshede and another, 1 C. & K., 657, Denman, J., admitted against the defendants, on a charge of conspiracy, answers which they had made on oath in a suit in Chancery. In Reg. v. Sloggett, 3 Dears, C. C., 656, the prisoner was examined in the Court of Bankruptey, under an adjudication against him and answered question tending to criminate himself without objection. At a certain stage of his examination, he was told by the commissioner to consider himself in custody. On a case reserved, it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case Jervis, C. J., observes: "The test is, whether he may object to answer. If he may, and he does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In Reg. v. Chidley and Commins, 8 Cox C. C., 365, Cockburn, C. J., admitted a deposition made by Cummins, when Chidley alone was accused of the offence for which they were afterwards both tried. The learned editor of the 5th edition of Russell on Crimes (vol. 3, p. 482), thus reports a case of Reg. vs Sarah Chesham: "Where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion; no charge had at that time been made against her; she made a statement on oath, which the coroner took down in writing. Campbell, C. J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed." The case of Reg. vs Garbett, Den. C. C., 236, accords with the foregoing. There the prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled, and he was compelled to answer. It was held, by a majority of the judges, on a Crown case reserved, that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible. The case of Reg. vs Scott, D. & B. C. C, 47, seems to go somewhat further. It was there held by the Court of Criminal Appeal (Coleridge, J., dissenting), that although, under the Bankruptcy Act then in force (12 and 13 Vict., c. 106), the bankrupt was bound to answer certain questions, nowithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the improper exercise of judicial authority. From these cases, to which others might be added, it results, in their Lordships'

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opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle Nemo tenetur seipsum accusare, but does not apply to answers given without objection, which are to be deemed voluntary. The Chief Justice indeed suggests that Coote may have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of the law, but be this at it may, it is obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule recognised as essential to the administration of the criminal law, Igorantia juris non excusat. With respect to the objection that Coote when a witness should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned (a question said by BADGLEY, J., not to have been reserved, but which is treated as reserved by the Court), it is enough to say that the caution is by the terms of the statutes applicable to accused persons only, and has no application whatever to witnesses. If, indeed, the Fire Marshal had exercised the power which he possessed of arresting Coote on a criminal charge (but which he did not exercise), then it would have been proper to caution him before any further statement from him had been A question has been raised on the part of the Crown, whether or not the Court had the power of ordering a new trial, inasmust as c. 77, s. 63, of the Consolitated Statutes of Canada, giving the Court power to direct a new trial, has been repealed by the subsequent Statute, 32 & 33 Vict., c. 29, s. 80, which does not itself in terms confer any such power, but in the view which their Lordships take of the case it becomes unnecessary to determine this question. For the reasons above given, their Lordships will humbly advise Her Majesty, that the judgment made by the Court of Queen's Bench be reversed,—that the conviction be affirmed, -and that the Court of Queen's Bench be directed to cause the proper sentence to be passed thereon. By an Order in Council, it was ordered that the judgment of the Court of

Queen's Bench of the 15th of March, 1872, be reversed, and the conviction of the Respondent, EDWARD COOTE, affirmed, and the Court of Queen's Bench, province of Lower Canada was directed to cause the proper sentence to be passed thereon. (18 J., 103; 2 R. C., p. 231; 4 L. R., A. C., p. 599, et 9 Moore's P. C. R., N. S., p. 463.)

BISCHOFF, BOMPAS & BISCHOFF, Solicitors for the Appellant.

RESPONSIBILITY OF A MASTER OF A VESSEL.

VICE-ADMIRALTY COURT, Quebec, 28th November, 1873.

Coram G. OKILL STUART, Q. C., Deputy Judge and Surrogate.

THE "GORDON," CROSBY, MASTER.

Held:—1. That where a vessel, passing down the St-Lawrence in charge of a branch pilot, is, through the negligence of those on board, suffered to come into collision with a vessel at anchor, the owners of the former will be liable in damages, if it appear that its master and crew participated in the negligence of the pilot which occasioned the collision.

2. That participation will be inferred from the fact that the pilot was not actually on deck at the time of the collision, and had left his post in the presence of the mate who failed to keep a good lo b-out.

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PER CURIAM: On the sixteenth of August the Norwegian barque "Eros," of 466 tons, was anchored off the west end of Goose Island, the wind strong from the south-west, or west south-west. She lay to the ebb tide in eleven fathoms of water, with port anchor and forty-five fathoms of chain. The channel where she was anchored was in breadth from a mile to a mile and a quarter, and there was abundance of room on either side for vessels to pass her. Her sails were furled, the anchor watch set, and a look-out stationed forward. Between two and three o'clock in the afternoon a vessel, afterwards ascertained to be the "Gordon," of 604 tons, was seen coming down the river, with a fair wind and ebb tide, making six or seven knots an hour. All her square sails were set, except the mainsail. The weather was bright and clear, and vessels were visible at a distance of four miles. The "Gordon," came into collision with the "Eros," and thereby her jibboom, bowsprit, martingale, foretop mast, foretop-gallant mast, royal mast, the maintop-gallant mast, and main royal mast were carried away; the port cathead was bruised and strained, the outrigger broken, and three planks on the port bow and the wooden sheathing and metal below them damaged; the end of the maintopsail yard and both the trucks of the reversed, and potte, affirmed, cower Canada e passed there1. C., p. 599, et

the Appellant.

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and Surrogate.

e St-Lawrence in f those on board, for, the owners of smaster and crew oned the collision, that the pilot was d had left his post, lo 1-out.

the Norrea off the west he south-west, eleven fathoms thoms of chain. breadth from a abundance of Her sails were tioned forward. a vessel, aftertons, was seen b tide, making sails were set, and clear, and The "Gordon," by her jibboom, -gallant mast, in royal mast ed and strainthe port bow hem damaged; trucks of the

topgallant-mast heads were broken off, one of them was lost. several of the lanyards were broken, and other damage done to the "Eros." At the time of this collision the master of the "Gordon" was in the cabin which was on deck, and the pilot was in the cabin also, where he had gone but a few minutes before. The master, while in the cabin, heard the chief mate sing out: "Hard-aport, a ship right ahead." He then ran on deck and saw the "Eros" at anchor a little on the port bow of the "Gordon," not more than a cable's length off. The master of the "Gordon," who has been examined as a witness, has said that: "there was no one in particular on the look-out. The order "hard-a-port" given by the chief mate while he was in the cabin, was the proper order to give under the circumstances; an order to starboard instead of to port would have made it a bad job. That if the helm had been kept steady, as the pilot ordered when he last heard him speak before the collision, and the chief mate had not given the order hard-aport the "Gordon" would have struck the "Eros" 'stem on' about her port cathead; that when the vessels fouled, he thought he heard some one on board the "Gordon" sing out: "starboard." That he was at the wheel, and seeing that it was necessary to starboard to ease the blow, he righted the wheel from hard-a-port and put it a little to starboard, at which he left it. The effect of this starboarding was, he says, to slew his ship round and to prevent damage as much as possible. He attributes the collision to the pilot not keeping a vigilant watch as to where he directed the ship. The chief mate of the "Gordon" states: "the last order he heard him (the pilot) give to the man at the helm was "steady, keep her as she goes," this was between two or three o'clock in the afternoon. The order was obeyed, and about five minutes afterwards the steward, Henry Fraser, reported a vessel ahead. We were under sail at the time, going before the wind with the tide in our favor, at the rate of about five knots an hour through the water. He saw vessels ahead before the steward reported this one, but did not pay particular attention to them. When the steward reported the vessel ahead, he looked and saw a barque, which afterwards proved to be the "Eros" not a quarter of a mile and almost ahead. a little on the port bow. He reported, as he thought, to the pilot "vessel ahead," believing him to be on the house where he had seen him but a few minutes previously. Not receiving any answer he turned round and saw that the pilot was not there, he then ordered the man at the wheel, Adolphe Berer, to put the helm hard-a-port, which was done immediately. The "Gordon" was only two cables length from the "Eros" when he gave this order. The "Gordon" payed off to south-

ward, but not enough to clear the "Eros," and two or three minutes after he gave the order to port the vessels came into collision. There was nobody, he adds, specially on the lookout and the steward's duty is to attend to the cooking and provisions specially. The boatswain of the "Gordon" states that " he did not see the other vessel before the steward reported her, and that he looked when he reported, and she was then a cable's length and a half or two cables' length from the "Gordon," a very little on the port bow, very nearly ahead. It was not more than a minute and a half or two minutes after that the vessels came into collision. It was hard to tell whose watch it was, there was no watch set. We were all securing the deck-load ready for sea. There was no one on the look out that I know off, it was not the pilot's orders that there should be any one." The steward who was the first to report the ship ahead had gone forward accidentally, and it is very probable that if he had not done so the "Gordon" would have struck the "Eros" stem on and sunk her. The man at the helm from where he was could not see an object ahead. It has been proved by the respondents that objects ahead could be seen just as well from the top of the house aft as from the forward part of the ship, and that the lookout is generally posted aft in day time and forward at night. The pilot, examined for the respondents, says that when he left the deck the mate was close to the house on deck and must have seen him going into the cabin, that there was no lookout, that he had not ordered one, and if there had been one, had he reported the "Eros" a minute sooner, there would have been no collision, that he thought the people working forward were keeping a good lookout without orders from him, and if there had been a good lookout forward there would have been no collision. In this suit the owners f the "Eros" claim compensation upon the ground that the "Gordon" was improperly na igated, that her people were guilty of negligence, and that it was by their carelessness and default that the collision was occasioned. The answer of the owners of the "Gordon" is that she was in charge of a branch pilot to whose negligence the loss and damage sustained is to be imputed, and that they are consequently exempt from liability. A difficulty to be met with in most cases of collision, conflicting testimony, has not been met with on this occasion. The "Eros" has not been charged with having committed any fault, nor was she guilty of any, and the question is simply whether the injury sustained was a consequence of the negligence of the pilot alone, and to determine this question the evidence adduced on behalf of the owners of the "Gordon" will suffice. Her crew appear to have been attend-

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two or three sels came into on the Icokout ing and provin" states that ward reported she was then ngth from the nearly ahead. or two minutes t was hard to et. We were all was no one en e pilot's orders d who was the rd accidentally, ot done so the em on and sunk s could not see respondents that n the top of the nip, and that the and forward at dents, says that to the house on cabin, that there and if there had ute sooner, there ught the people it without orders ookout forward suit the owners ground that the her people were carelessness and he answer of the narge of a branch re sustained is to y exempt from cases of collision, on this occasion. aving committed the question is consequence of determine this he owners of the ave been attend-

ing more to securing the deck-load than to the navigating of the vessel. No watch was set, and there was no lookout. The pilot had left his post in the presence of the mate, who was in a position on the house to see objects ahead, and, according to his own testimony, he had seen vessels ahead but had paid nc particular attention to them. It may be a question as to which of the parties, the master and crew of the "Gordon," or her pilot, were most guilty of negligence, but that the two together were extremely careless there can be no doubt. The damage to the "Eros" is not attributable to the act of the pilot alone, but perhaps, more to the conduct of the master and crew of the "Gordon" than to his. It was decided in this Court on the 21st Nov., 1862, in the case of the "Courrier," that where a pilot is on board the ship he must be actually on deck and in charge to relieve the owners of their responsibility: and on the 25th October, 1867, it was decided, also in this Court, in the case of the "Secret," that the duty of the pilot is to attend to the navigation of the ship, and the master and crew to keep a good look-out. The owners of a ship a: compelled by law to have a pilot on board, and as a consequence when the fault is his exclusively they have the benefit of exemption from liability; but when they participate in it they are deprived of such relief. I must, therefore, pronounce against the owners of the "Gordon" for the damage done to the "Eros" by the collision. (18 $J_{\cdot \cdot}$, p. 109.)

BLANCHET & PENTLAND, for the promoters.

W. Cook, counsel.

FOURNIER, Q. C., and HEARN, for the respondents.

APPEAL TO PRIVY COUNCIL.—BURSIS.

SUPERIOR COURT, Montreal, 31st October, 1873.

Coram TORRANCE, J.

DE GASPÉ et al. vs Asselin, and De Gaspé et al., oppts.

Held: That the judge in the exercise of a sound discretion may grant a sursis of proceedings under execution to allow of an appeal to the Privy Council in England.

PER CURIAM: This case is before the Court on the merits of an opposition à fin d'annuler of a novel character. The opposants, who are the plaintiffs, set up, by their opposition, that they oppose the saisie-exécution in this cause; that they appeal to Her Majesty, in Her Privy Council, from a judgTOME XXIII.

ment of the Court of Queen's Bench, sitting in appeal, at Montreal, on the 23rd of June last, dismissing, with costs, their action against defendant, and that, to this end, they have notified their adversary, and have produced in the record of the Court of Queen's Bench, a notice of motion to be presented the 11th September then next, for permission to appeal to Her Majesty in Her Privy Council in England; that, under these circumstances, they think themselves well founded in demanding the suspension of all proceedings in execution until final adjudication on said appeal in England. They, therefore, prayed for a sursis of the execution, until final adjudication; that all the proceedings on execution adopted, or to be adopted, be suspended, and, in consequence, that all the proceedings be annulled on the reversal of said judgment of the Queen's Bench, in England. The plaintiffs contested this opposition, first, by a défense en droit, and next by a défense en fait. The case is now before the court on the merits. There is no documentary evidence of any proceedings for an appeal to England. There is only the evidence of Mr. Doutre, Q. C., for the defendant, and of Mr. D. D. Bondy. attorney for plaintiff, both of whom were interrogated for the plaintiff. Mr. Bondy has made a declaration of a changement d'état of Dame A. C. Aubert de Gaspé, but the declaration is unsupported by any document or by affidavit, and there is no proof of any proceedings before the Queen's Bench to be permitted to appeal to the Privy Council, and no permission has been yet given. On the merits, therefore, the Court is against the conclusions of the opposition. Another point is worthy of notice. One of the judges of this Court (BEAUDRY, J.), gave an order of sursis on the affidavit of the plaintiff, and suspended the issue of the execution until a decision on this opposition. The defendant has spoken somewhat strongly against the allowance of the opposition by a judge of this Court, but the Court as now constituted, after careful consideration, sees no irregularity or want of discretion in that allowance. Emergencies will arise requiring the provisional and summary intervention of the Judge. With this remark, the Court here dismisses the opposition with costs. (18 J., p. 112.)

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D. D. BONDY, for opposants.

DOUTRE & DOUTRE, for plaintiffs.

PROCEDURE.—CONSENTEMENT DES PARTIES.

COUR DU BANC DE LA REINE, EN APPEL. Montréal, 12 décembre 1871.

Présents: DUVAL, J. en C., CARON, J., DRUMMOND, J., BAD-GLEY, J., MONK, J.

McAndrews et Rowan.

Jugé: Que, nonobstant le consentement des parties que le jugement dont est appel soit renversé, cette Cour doit le confirmer, si l'examen du dossier démontre qu'il est bien fondé, et dans l'espèce, elle le confirme. (3 R. L., p. 439; 2 R. C., p. 106.)

ACTION PAULIENNE.—PRAUDE.

COUR DU BANC DE LA REINE EN APPEL, Montréal, 22 décembre 1871.

Coram Duval, Caron, Drummond, Badgley & Monk, JJ.

NATHANIEL S. WHITNEY, appelant, et Joseph W. Shaw, intimé.

Jugé: Que la connaissance de l'insolvabilité d'un failli au temps d'un contrat fait avec lui au préjudice des créanciers, doit s'inférer des circonstances où se trouve le failli, et que sa parenté avec celui avec qui il contracte doit être prise en considération. (Caron et Monk dissidents.)

L'intimé était créancier hypothécaire de Samuel R. Warren. en vertu d'un acte exécuté le 4 mars 1865, et enregistré le 9 du même mois. Warren fit cession, le 23 mai 1865, sous l'acte de faillite de 1864. Dans la feuille des dividendes, Shaw, l'intimé, fut colloqué pour \$1462.86, à compte de son hypothèque. La collocation fut contestée par Whitney, l'appelant, (créancier chirographaire), sur le motif que l'hypothèque de Shaw avait été consentie par le failli alors en déconfiture : que Shaw était le gendre du failli, et connaissait sa condition d'insolvable, et que l'hypothèque avait été consentie collusoirement et en fraude des créanciers. Le syndic, le 18 août 1869, maintint la contestation de Whitney. Shaw appela de e jugement devant l'Hon. juge Mackay, qui, le 30 octobre 1869, renversa le jugement du syndic: "Considering that Whitney hath failed to establish that any fraud existed on the part of Shaw, in respect of his claim, or that any fraudulous concert existed between him and the Insolvent Warren, by reason whereby his claim should be rejected."

in appeal, at ng, with costs, this end, they oduced in the e of motion to r permission to il in England; hemselves well proceedings in eal in England. execution, until s on execution in consequence, reversal of said The plaintiffs droit, and next the court on the any proceedings the evidence of Mr. D. D. Bondy, interrogated for tion of a change-, but the declaraby affidavit, and fore the Queen's y Council, and no rits, therefore, the osition. Another ges of this Court he affidavit of the execution until a has spoken some.

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C'est de ce jugement dont est appel à la Cour du Banc de la Reine. L'appelant, dans son factum, s'appuie sur l'acte de 1864, ch. 17, s. 8, §§ 3 et 4, et prétend que Warren a consenti cette hypothèque en contemplation de son insolvabilité, pendant que les affaires étaient telles, qu'il a dû avoir connaissance que son insolvabilité était inévitable. Que le fait pour l'intimé d'être gendre du failli et de lui avoir demandé une hypothèque en 1864 est une présomption qu'il connai-sait cette insolvabilité. L'intimé concède, pour l'argumentation, qu'il est établi que Warren devait être de facto insolvable quelque temps avant l'hypothèque consentie; mais il est aussi évident que la preuve établit qu'il n'était pas alors plus insolvable qu'il l'avait été depuis plusieurs années; que Warren luimême ne connaissait rien de son insolvabilité jusqu'à ce que quelqu'un, avant la cession, eût examiné de très près ses affaires. Que Shaw connaissait encore moins cette déconfiture. Il explique comment Shaw, devant partir pour les Etats-Unis, demanda cette hypothèque. Que les crénnciers de Warren, il est à remarquer, y compris l'appelant, ne se sont jamais opposés à la décharge de Warren, ce qui est une admission tacite qu'il n'y avait rien de frauduleux dans sa conduite.

La Cour du Banc de la Reine a maintenu la contestation: "Considering that Appellant, Contestant below, hath established the material averments of his contestation to the collocation of Respondent, as a mortgage creditor of the insolvent, Samuel R. Warren, in and upon the proceeds of his real property for distribution in the hands of Thomas S. Brown. the assignee of the insolvent estate of Warren: Considering that the mortgage claimed by Shaw upon the real property of the Insolvent was obtained by Respondent from Insolvent at a time when the Insolvent was notoriously insolvent, to the knowledge of Respondent, and for the purpose of obtaining a fraudulent preference over others the creditors of the insolvent: Considering that the contestation. by Appellant, of the collocation in favor of Respondent of his inortgage claim is well founded, and considering that, in the judgment of the Court sitting in Review, rendered on the thirtieth day of October 1869, upon the judgment of the assignee by him rendered on the eighteenth day of August then preceding, there is error, doth reverse and set aside the judgment of the thirtieth day of October 1869." Contrd Caron et Monk quant à l'appréciation de la preuve. M. le juge Caron pense de plus que la parenté n'est pas une présomption de fraude. (3 R. L., p. 439; 4 R. L., p. 483; 2 R. C., p. 106.)

RITCHIE, MORRIS & ROSE, pour l'appelant. BETHUNE & BETHUNE, pour l'intimé. r du Banc de la r l'acte de 1864, a consenti cette abilité, pendant ir connaissance fait pour l'intiandé une hypoonnai-sait cette ntation, qu'il est olvable quelque est aussi évident plus insolvable ue Warren luié jusqu'à ce que le très près ses ns cette déconpartir pour les les créanciers de elant, ne se sont ce qui est une

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COMPENSATION.

Cour Supérieure en Revision, Montréal, 31 octobre 1871.

Présents: Mondelet, J., dissident, Benthelot, J., Mackay, J.

PERRAULT VS HERDMAN.

Jugé: Qu'un défendeur poursnivi pour le recouvrement du montant d'un billet promissoire, ne peut offrir en compensation une somme qu'il dit lui être due pour sa part de la récolte d'une terre dans laquelle les parties ont un intérêt commun, et dont le demandeur refuserait de lui rendre compte, vu que cette dernière créance n'est pas claire et liquide. (3 R. L., p. 440; 2 R. C., p. 106.)

PROCEDURE. - DECLARATION.

COUR SUPÉRIEURE, EN REVISION, Montréal, 31 octobre 1871.

Présents: Mondelet, J., Berthelot, J., Mackay, J., (dissident).

MARCOUX vs MORRIS.

Jugé:—Que l'action pour assumpsit de la procédure anglaise, n'existe

pas dans notre système de procédure.

Les parties ci-devant en société avaient fait un arrêté de leur compte social, par lequel le défendeur se reconnut endetté au demandeur en la somme de \$232. L'action intentée était l'assumpsit de la procédure anglaise, pour marchandises vendues et livrées, argent prêté, matérial fournis, account stated. Jugé, que l'action doit être l'action pro socio, et non pas l'assumpsit qui n'existe pas et ne peut être toléré dans notre système de procédure. (3 R. L., 441; 2 R. C., 107.)

LOUAGE DE MAISON.

Cour Supérieure, en revision, Montréal, 31 octobre 1871.

Coram Mondelet, J., (dissident), Berthelot, J., Torrance, J

TYLEE US DONEGANI.

Jugé:—Que le locataire d'une maison inhabitable et malsaine a le droit de l'abandonner, et, par là même, de résilier le bail, sans action, nimettre en demeure son propriétaire et cela, quand bien même la nuisance aurait pu être enlevée à peu de frais et sous peu de temps. (3 R. l., 441; 2 R. C., 107.)

CORPORATION MUNICIPALE.—RESPONSABILITE.

COUR SUPÉRIEURE, Montréal, 31 octobre 1871.

Présent: MONDELET, J.

MERCANTILE LIBRARY ASSOCIATION vs Corporation DE Mont-RÉAL.

Jugé:—Que pour qu'un propriétaire puisse réclamer une indemnité par suite du nivelage des rues, il faut que ce nivelage ait été fait sur la devanture de sa propriété. Le nivelage sur le front du voisin n'est pas suffisant. D'ailleurs dans l'espèce, il ne paraît pas que le nivelage chez le voisin ait été fait avec l'autorisation de la corporation. (3 R. L., 441; 2 R. C., 107.)

SUBSTITUTION.

COUR SUPÉRIEURE, EN REVISION, Montréal, 31 mai 1873.

Présents: MACKAY, J. (dissident), TORRANCE, J., BEAUDRY, J.

Dame MARIE MATHILDE ROY et vir, demanderesse, et Dame MARIE ELÉONORE GAUVIN et al., défenderesses.

Jugé:—(MACKAY, J., diss.) Que la disposition suivante d'un testament: "je donne et lègue la jouissance à mes enfants pour par eux en jouir à titre de constitut et précaire leur vie durant... et, après le décès des dits légataires en usufruit, la propriété des dits biens-fonds appartiendra à leurs enfants nés et à naître," contient une substitution malgré les termes qui y sont employés.

20 Que cette autre disposition que les biens de la testatrice ne seront partagés, entre ses petits-enfants, également qu'après le décès des enfants de la dite testatrice, ne cesse pas de comporter l'idée de substitution

30 Que le partage entre les petits-enfants, à l'époque où, d'après le testament, il pouvait être fait, devait avoir lieu par souche et non par tête.

Dame Marie-Anne Girouard, veuve de feu Pierre Barsalou, fit, le 10 février, 1830, devant notaire et témoins, son testament par lequel elle disposa de l'universalité de ses biens, comme il est dit plus bas dans les jugements cités. A l'époque de la confection de ce testament il existait trois enfants issus du mariage de la testatrice avec le dit Pierre Barsalou, savoir: Marie Marguerite, épouse de Joseph Gauvin; Marie-Anne, épouse de Joseph Thibodeau; Marie Henriette, épouse de Jean-Baptiste Archambault. En mai 1843, mourut madame Archambault, la testatrice; sa fille, madame Thibodeau était morte neuf ans plus tôt, laissant sept enfants. De sorte que

octobre 1871.

RATION DE MONT-

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testatrice ne seront près le décès des enr l'idée de substitu-

ue où, d'après le tesiche et non par tête.

Pierre Barsalou, émoins, son testalité de ses biens, cités. A l'époque ois enfants issus Barsalou, savoir: in; Marie-Anne, iette, épouse de mourut madame Thibodeau était its. De sorte que à son décès, madame Barsalou laissa trois héritières dont l'une était représentée. On prit immédiatement possession des biens laissés par la testatrice et, lors de la constatation de ces biens devant notaire, il fut procédé au partage par tiers des fruits et revenus échus. On convint même de procéder ainsi dans la suite. Madame Gauvin est décédée le 28 février 1856, bissant trois enfants. Plus tard, en 1870, madame Archambault, la dernière des trois filles de la testatrice, mourut laissant aussi deux enfants. La demanderesse est cessionnaire des droits ou prétentions de quatre des enfants Thibodeau et de ceux de l'un des enfants Gauvin. Par son action elle demande le partage de la succession de dame Barsalou, auquel ne s'oppose pas les défenderesses. Mais ce à quoi ces dernières s'opposaient, c'est le partage par tête entre les petits-enfants de dame Barsalou, vivants à l'époque du décès de madame Archambault, en 1870. La succession ainsi répartie, la famille Thibodeau, qui ne se composait plus que de six membres, le septième étant absent avant même le décès de madame Barsalou, se trouvait à recueillir six parts, et la famille Archambault, deux parts : c'est-à-dire, 1711 pour chacun des membres de chacune des trois familles. Les défenderesses prétendirent que, même dans ce cas, la division par tête ne pouvait se faire qu'en faveur des petits-enfants alors vivants. On de la famille Thibodeau il ne restait plus que deux membres, les autres étant ou morts ou absents; chaque tête devait donc recevoir 177. D'un autre côté, la division par souche donnait le résultat suivant: 1718 pour chacun des 6 Thibodeau; 2718 pour chacun des 3 Gauvin, et 3718 pour chacun des 2 Archambault. Alors les deux défenderesses Gauvin avaient chacune droit à 179 de la succession. Entin, la défense prétendit que les Thibodeau devaient être exclus du partage, le legs fait à leur mère étant devenu caduc par le prédécès de dame Thibodeau.

Voici, sur cette contestation, le jugement rendu par la Cour Supérieure, MACKAY, J., à Montréal, le 29 décembre 1871: "La Cour considérant que la disposition testamentaire contenue dans le testament solennel de dame Marie-Anne Girouard, reçu à Montréal, le dix février, mil huit cent trente, devant Mtre Latour et témoins, par laquelle elle disposa de l'universalité de ses biens dans les termes suivants: Quant à tous les biens immeubles, acquêts, conquêts et propres qui appartiendront à la dite testatrice et qu'elle délaissera au jour et heure de son décès, à quelque quantité et qualité qu'ils pourront monter et consister, et en quelques lieux et endroits qu'ils se trouveront, elle en donne et lègue la jouissance aux dits enfants issus de son mariage avec le dit Pierre Barsalou pour par eux, en jouir à titre de constitut et précaire leur vie durant seulement, à la charge d'entre-

tenir les dits biens-fonds des réparations nécessaires à y ' faire, et de faire assurer la maison et bâtiments érigés sur "iceux, au montant d'une somme de mille livres, cours actuel, " et après le décès des dits légataires en usufruit; être réver-" sible et appartenir, la propriété des dits biens-fonds, à leurs " enfants nés, et à naître en légitime mariage, pour n'être " partagés entre eux également qu'après le décès du dernier des " enfants de la dite testatrice," contient non pas une substitu-" tion mais une donation d'usufruit en faveur des enfants de " la testatrice, vivants au jour de son décès et de propriété en " faveur de ses petits-enfants ou leurs enfants de représenta-" tion par tête et non par souches, vivants au jour du décès " de la dernière des usufruitières. Considérant que les enfants " de la testatrice n'ont pas été gratifiés de la propriété. Con-" sidérant qu'au jour du décès de la dite Marie Henriette Bar-" salou, en mil huit cent soixante-et-dix, il existait dix petits-" enfants de la testatrice, et des enfants d'un autre petit-" enfant décédé, lesquels sont tous co-donataires et légataires, " et ont droit au partage des immeubles de la testatrice en "onze parts, savoir: Marie Eléonore Gauvin, épouse de John "Ostell; Marie Sophie Gauvin, veuve de feu Julien Perrault; " Virginie Archambault, épouse de Adolphe Ouimet; Josephte-"Heariette Archambault représentée par sa sœur Virginie, " quant à l'usufruit, et par le dit Adolphe Ouimet, ès-qualité " de tuteur, quant à la propriété; Marie Caroline Thibodeau, "représentée par ses enfants, Théophile Vézina, Elzéar Vézina " Marie Caroline Georgienne Vézina, et la demanderesse comme "étant aux droits de Paul-Xavier Thibodeau, Honoré Thibo-"deau, François-Cyrille Thibodeau, et Pierre-Paul-Arnold "Thibodeau, enfin la demanderesse, comme représentant " Marie Eulalie Gauvin, épouse de Charles A. Brault et les "dits petits enfants Thibodeau, lesquelles parties sont toutes " régulièrement devant cette Cour. Considérant qu'au jour " de son décès, la dite Marie-Anne Girouard était en posses-" sion, comme propriétaire, de l'immeuble suivant : (suit la "désignation de bien meuble) dont le partage est poursuivi " dans et par la présente cause en exécution de la dite dispo-" sition testamentaire. La Cour déclare la demanderesse pro-" priétaire par indivis du dit immeuble, d'abord : pour cinq " onzièmes et aussi pour quatre cinquante-cinquièmes de la "dite propriété; Jean Vézina, Théophile Vézina et Elzéar "Vézina, pour un autre onzième et aussi pour un cinquante-"cinquième; Marie Eléonore Gauvin, pour un onzième; " Marie-Rosalie Gauvin, pour un autre onzième et aussi pour " l'usufruit d'un autre onzième, comme grevé de substitution " de Josephte-Henriette Archambault, et le dit Adolphe Oui-" met, ès-qualité de tuteur à la dite substitution, pour un onécessaires à y nts érigés sur s, cours actuel. it. être rever--fonds, à leurs ze, pour n'être du dernier des s une substitudes enfants de le propriété en de représentau jour du décès que les enfants ropriété. Con-Henriette Bartait dix petits. un autre petites et légataires, la testatrice en pouse de John ulien Perrault; imet; Josephtesœur Virginie, met, ès-qualité line Thibodeau, , Elzéar Vézina nderesse comme Honoré Thibore-Paul-Arnold e représentant Brault et les

ties sont toutes int quau jour tait en possesvant : (suit la e est poursuivi la dite dispoanderesse proord: pour cinq nquièmes de la zina et Elzéar un cinquanteun onzième; e et aussi pour e substitution Adolphe Oui-, pour un on" zième de la propriété seulement, comme représentant les appelés, et ordonne qu'il sera procédé au partage du dit immeu-" ble, suivant les dispositions du chapitre quatrième, livre deux-" ième, titre deuxième du Code de Procédure Civile du Bas-"Canada; qu'en conséquence, avant de prononcer sur la de-" mande du partage, la visite et estimation du dit immeuble, de ses bâtisses et dépendances, sera faite par experts, nom-" més suivant les règles ordinaires afin de constiter si la tota-"lité du dit immeuble peut se partager convenablement et, " dans ce cas, être ordonné et fait ce que de droit; que si, " d'après le rapport des dits experts ou autrement, il apparaît " que le dit immeuble et ses dépendances ne peuvent se par-" tager le dit immeuble et ses dépendances seront mis aux en-" chères publiques et vendus par voie de licitation, après les "annonces, affiches et autres formalités prescrites par le dit "chapitre du Code de Procédure Civile, à telles conditions " qui seront portées au cahier des charges qui sera approuvé par le tribunal ou l'un des juges, pour le produit de la dite " vente, après paiement des frais de la présente poursuite et autres dépenses nécessaires pour l'intenter, être distribué "entre les dits co-héritiers, co-donataires et co-propriétaires, "dans les proportions, parts et fractions susdites et, plus particulièremet, pour être la dite demanderesse payée et colloquée à même les deniers provenant de la vente (déduction "faite des dits frais et dépenses), à raison de cinq onzièmes et quatre cinquante-cinquièmes de la dite propriété sur iceux, " le tout avec les dits frais et dépens contre les dits co-partageants, au pro-ratu de leurs droits de propriété respectifs, dans les proportions, parts et fractions susdites, et avec frais de contestation contre tels défendeurs qui les ont provo-

Ce jugement, porté devant la cour de revision, a été renversé et réformé comme suit : "Considérant que, par sontestament solennel, reçu devant M. Latour, notaire, et témo ins y dénominés, le 10 février 1830, Marie-Anne Girouard, alors veuve de feu Pierre Barsalou, fit la disposition suivante, savoir: "Quant à tous les biens immeubles, acquêts, conquêts et propres qui appartiendront à la dite testatrice, au jour et " heure de son décès, à quelque quantité et qualité qu'ils pour-"ront monter et consister, et en quelques lieux et endroits qu'ils se trouveront, elle en donne et lègue la jouissance aux dits enfants issus de son mariage avec le dit S. Pierre Barsalou, pour par eux en jouir, à titre de constitut et précaire, leur vie durant seulement, à la charge d'entretenir les dits bien -- fonds, etc...., et, après le décès des dits légataires en usufruit, être réversible et appartenir, la propriété des dits biens-fonds, à leurs enfants nés et à naître en légitime ma-

" riage, pour n'être partagés entre eux, également, qu'après le " décès des enfants de la dite testatrice." Considérant que cette disposition, nonobstant les expressions qui y sont employées, contient une véritable substitution dont les enfants de la dite testatrice étaient grevés en faveur de leurs propres enfants, en autant qu'ils étaient saisis de la propriété de ces biens, comme plus proches héritiers légitimes de la dite testatrice. Considérant que l'intention manifeste de la dite testatrice était de transmettre ses biens à ses petits-enfants, mais avec condition que ces biens ne pourraient être partagés entre eux qu'après le décès de tous les enfants nés de la dite testatrice. Considérant que l'intention de la dite testatrice, telle que comprise et mise à exécution, par les enfants eux-mêmes, était de transmettre aux enfants de chacun des enfants de la testatrice la part et portion des biens qui auraient pu échoir à ces derniers. Considérant qu'au jour du décès de la testatrice, il existait six enfants issus du mariage de Marie-Anne Barsalou, une des filles de la testatrice, et mariée à Joseph Thibodeau, seuls héritiers apparents, un septième étant absent depuis nombre d'années, sans qu'on ait de ses nouvelles; qu'il existait deux enfants issus du mariage de la dite Marie-Anne Girouard avec le dit feu Pierre Barsalou, savoir : Marie-Marguerite Barsalou, alors veuve de feu Joseph Gauvin, et Marie-Henriette Barsalou, mariée à J. B. Archambault, et que tous ces enfants et petitsenfants ont, par acte reçu à Montréal, le 5 août 1843, devant Mtre Martin et son confrère, notaires, consenti au partage des revenus des biens, délaissés par la dite Marie-Anne Girouard, par tiers, dont un tiers, pour les enfants Thibodeau, un autre tiers pour la dite Marie-Marguerite Barsalou, et un autre tiers pour la dite Marie-Anne Barsalou. Considérant que, vu le décès de tous les enfants de la dite testatrice, il y a lieu au partage des biens par elle délaissés, entre les petits-enfants par souche, de la manière établie dans et par le dit acte du 5 août 1843. Considérant que la dite Marie-Marguerite Barsalou n'a laissé que trois héritiers, savoir les dites défenderesses, dame Marie-Eléonore Gauvin, dame Marie-Sophie Gauvin et dame Eulalie Gauvin, lesquelles ont droit chacune à un neuvième de la succession de la dite testatrice; et que la dite Henriette Barsalou a laissé deux enfants, savoir les dites Marie-Josephte-Henriette Archambault et Virginie Archambault, qui ont droit chacune à un sixième de la dite succession. Considérant que la demanderesse a acquis, par justes titres mentionnés en la déclaration, le tiers afférant à la dite dame Eulalie Gauvin, ainsi que quatre dix-huitièmes afférant à Paul-Xavier Thibodeau, Pierre-Paul-Arnold Thibodeau, Honoré Thibodeau, et François-Cyrille Thibodeau, les deux dix-huitièmes restant appartenant à Marie Caroline Thibodeau

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et à Sophie-Zoé Thibodeau. Considérant qu'il dépend de la succession testamentaire de la dite Marie-Anne Girouard, un immeuble décrit comme suit, savoir : (suit la désignation de l'immeuble). Considérant, pour ces raisons, qu'il y a erreur dans le dit jugement, par lequel le partage est ordonné dans des proportions différentes, annule et met au néant le dit jugement. Et la cour procédant à rendre le jugement que la cour en première instance aurait dû rendre, déclare les parties en cette cause propriétaires du dit immeuble, dans les proportions ci-dessus exprimées, et ordonne que, pir experts à être nommés suivant la loi, il soit procédé à constater si le dit immeuble peut être commodément partagé entre les parties dans les proportions ci-dessus; et aux fins de procéder à la nomination des dits experts, les parties devront comparaître devant un des juges de cette cour, au Palais de Justice de cette ville, sous un mois, pour, sur le rapport des dits experts, être fait et ordonné ce que de droit, dépens réservés." (14 R. L., p. 270; 3 R. L., p. 443, et 2 R. C., p. 109.)

PRETEUR SUR GAGE.

COUR SUPÉRIEURE, Montréal, 29 décembre 1871.

Coram MACKAY, J.

C. F. G. LAVIOLETTE, demandeur, vs Ls A. DUVERGER, défendeur.

Jugé: Que les secs. 69 et 70 de "l'Acte des Lice nœs de Québec," 1870, ch. 2, ne s'appliquent qu'aux personnes faisant le commerce de prêteurs sur gage, et non à un particulier qui 'prête de l'argent à un antre son ami, et qui, en le faisant, prend, comme sûret⁶, une montre ou autre chose en gage, ce que les Statuts n'ont jamais entendu prohiber.

La présente est une action en saisie revendication par laquelle le demandeur réclame, comme sa propriété, une montre en or de la valeur de cent piastres que le défendeur, suivant lui, détiendrait injustement et sans droit. Par une exception péremptoire en droit, le défendeur admet qu'en effet il a entre ses mains la montre en question; mais qu'elle lui a été remise par le demandeur lui-même à titre de gage, et comme sûreté du remboursement d'une somme de \$40, qu'il aurait prêtée au demandeur avant la présente action. En conséquence il conclut à ce qu'il soit déclaré, par le jugement à intervenir, qu'il a un droit de gage sur la montre saisierevendiquée, et qu'il soit autorisé à la retenir en sa possession

jusqu'à parfait paiement. A cette exception le demandeur répond que le défendeur n'était pas un prêteur sur gage suivant la loi, n'avait pas le droit d'accepter en gage aucun objet du demandeur. Les faits de la cause sont tous admis de part et d'autre. Il est spécialement admis que ce prêt de \$40 a été fait de la part du défendeur dans le seul but d'obliger le demandeur, et sans aucun espoir de gain, le prêt étant gratuit. Le demandeur invoque les sections 69 et 70 de l'acte des licences de Québec, 1870, 34 Vict., ch. 2, où il est dit: "Nulle " personne ne fera le commerce de prêter sur gage dans cette " province, sans être munie d'une licence, et tout prêteur sur "gage contrevenant à cette section encourra une amende de "deux cents piastres pour chaque gage qu'il prendra sans "licence. 70. Toutes les personnes qui recevront en gage ou " en échange d'une personne des effets pour le remboursement " de l'argent prêté sur ces effet, si ce n'est dans le cours ordi-" naire des affaires de banque ou des transactions commer-" ciales, entre marchands ou négociants, seront censés être des " prêteurs sur gage suivant le sens et l'intention du présent " acte." Le demandeur prétend que ces deux paragraphes de la loi doivent s'interpréter strictement et suivant leur sens littéral. En conséquence, le défendeur n'étant pas prêteur sur gage, et n'ayant pas pris de licence comme tel, le contrat intervenu entre le défendeur et lui est nul, avant été fait en violation de la loi. Le défendeur prétend que ces deux paragraphes doivent être pris dans leur ensemble et être interprétés comme s'expliquant l'un et l'autre. La section 69 dit: "Personne ne fera le commerce...." L'intention du législateur était évidemment de taxer celui qui fera le commerce de prêteur sur gage. La loi a donc pour but d'atteindre celui-là seul qui prête sur gage dans le but de faire du gain. Les prêteurs sur gage forment une classe à part à qui la loi a donné certains privilèges nécessaires pour leur protection et celle des emprunteurs, et ce sont ces privilèges qu'elle entend faire payer. Le législateur n'a donc pu vouloir atteindre le citoyen qui pour obliger un ami lui prête quelques deniers sans exiger d'autre intérêt que la certitude d'être remboursé. Cette transaction est parfaitement conforme au droit commun, et pour cette raison, ne pourrait être déclarée nulle que sur une disposition formelle du statut. Le défendeur fait voir aussi la position d'avorable du demandeur, qui invoque sa propre i il lise foi. Il devait savoir, en effet, comme aujourd'hu etendue nullité du contrat de gage intervenu entre lui de demandeur. ainsi induit le défendeur en erreur pour en obtenir de l'argent, et la cour en lui rendant l'objet déposé en gage, avant qu'il ait payé sa dette, récompenserait sa mauvaise foi. Autorités cités par le défendeur: Dwarris, p. 724; Toullier, VI, p. 125; Chardon, vol. 1er, pp. 96 et 97—et III, p. 75.

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Toullier, VI,

p. 75.

PER CURIAM: This was an action en suisie-revendication of a gold watch. The watch was left by defendant by way of gage, but plaintiff now pretended that the gage was null and void, because defendant had no right to make a loan on a gage, not having a license. He contended that a single act of lending on gage would be held to be tracing, and would expose the party to a penalty. In this case, there was certainly one act of lending on gage. The plaintiff, therefore, claimed the watch back and refused to return the money he had received. The court was against his pretensions. Were it maintained, a man would have to put up on the door that he was a lender of money on pledge, before he could advance his friend a sum of money on a security. The contract of pledge was not forbidden by the act respecting pawnbrokers licenses. The license was only required when a man carried on the business of lending on pledges, but a pret sur gage, as in this case, was quite legitimate. The defendant was entitled to hold the watch until paid and the action would therefore be dismissed.

Le jugement de la cour est comme suit : "La cour, considérant que le défendeur a fait preuve des allégations essentielles de l'exception par lui plaidée à cette action, et que le demandeur est mal fondé dans sa réponse à ladite exception, en prétendant que le défendeur n'a pas le droit de garder, comme gage, la montre en question en cette cause, cette cour renvoie ladite défense, et maintient ladite exception, déclare le défendeur avoir un droit de gage sur la montre saisie-revendiquée en cette cause, adjuge que la saisie-revendication est nulle et de nul effet, et la déboute, par les présentes, de même que l'action du demandeur, et ordonne que la montre soit remise au défendeur, pour la garder en sa possession jusqu'à ce qu'il solt payé de la somme de \$40, le tout avec dépens contre le demandeur." (3 R. L., pp. 444, 521; 6 R. L., p. 723; 2 R. C.,

p. 109.)

LANCTOT & LANCTOT, avocats du demandeur.

BÉLANGER, DESNOYERS & OUIMET, avocats du défendeur.

AVIB D'ACTION.

COUR SUPÉRIEURE EN REVISION, Québec, 6 novembre 1871.

Présents: MEREDITH, J. en C., STUART, J., dissident, et TASCHEREAU, J.

CRAIG vs CORPORATION DE LEEDS.

Jugé: Qu'avant de porter une action contre une municipalité pour dommages soufferts et causés par le mauvais état des chemins sous sa surveillance, on doit lui donner un mois d'avis de cette action. (3 R. L., p. 444; 2 R. C., p. 110.)

PRODUREUR AD LITEM.

COUR SUPÉRIEURE EN REVISION, Québec, 6 novembre 1871.

Présents: MEREDITH, J. en C., STUART, J., TASCHEREAU, J.

DESROSIERS vs McDonald.

Jugé: Qu'une cause peut être inscrite en revisior rar un avocat autre que celui de record en première instance, et sans substitution. (3 R. L., p. 445; 2 R. C., p. 110.)

PREUVE.

COUR SUPÉRIEURE EN REVISION, Québec, 30 décembre 1871.

Présents: MEREDITH, J. en C., STUART, J., et TASCHEREAU, J.

DOYON vs DOYON.

Jugé: Qu'il n'est pas besoin d'une inscription en faux pour faire admettre la preuve que des deniers, dont le reçu est constaté dans un acte de vente, n'ont jamais été payés. (3 R. L., p. 445; 14 R. L., p. 138; 2 R. C., p. 110.)

TABLE ALPHABÉTIQUE

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MATIÈRES CONTENUES DANS CE VOLUME.

ABORDAGE. Si l'abordage est le résultat de la négligence du pilote et du mattre et de l'équipage du vaisseau abordeur, les propriétaires de ce dernier sont responsables des dommages cansés au vaisseau abordé. (Affaire du vaisseau Gordon, C. de V.-A., Quèbec, 28 novembre 1873, STUART, J., 18 J., p. 109; 23 R. J. R. Q., p. 510.)

ACTE D'ACCUSATION:—Vide PROCÉDURE CRIMINELLE.

DES LICENCES. La loi des licences de 1870, S. Q., 34 Vict., ch. 2, sec. 158, décrétait que: "Deux ou un plus grand nombre d'offenses commises par la même personne, peuvent être comprises dans telle plainte, pourvu que le temps et le lieu de chaque offense soient indiqués." Aux termes de cette section, une condamnation, portée pour deux contraven-tions encourant deux pénalités différentes, doit spécifier, pour chaque contravention, la temps, le lieu et la pénalité. (Paige et Griffith, C.S., Sherbrooke, 1873, Sanbon, J., 18 J., p. 119; 23 R. J. R. Q., p. 258.)

DES LICENCES. Le ch. 2 des S. Q. de 1870, 34 Vict., intitulé:

"Acte pour refondre et amender la loi relative aux licences. et aux droits et obligations des personnes tenues d'en être munies," décrétait sec. 152 que : "A moins que les termes du présent acte ne désignent quelque autre tribunal, toute action ou poursuite intentée en vertu du présent acte, lorsque la somme ou l'amende réclamée, ou telle somme et amende réunies, excèdent cent plastres, sera portée devant la Cour de Circuit ou la Cour Supérieure, suivant le montant que l'on veut recouvrer et la juridiction desdites cours; et toutes autres actions ou poursuites pourront être intentées devant deux juges de paix pour le district, ou un juge des sessions de la paix, ou un recorder, ou un magistrat de police, ou un magistrat de district, ou, excepté dans les districts de Québec et de Montréal, devant le shérif du district." Le § 2 de la sec. 153 se lisait ainsi qu'il suit: "Si cette poursuite est portée devant deux autres juges de paix, la sommation sera signée par l'un d'eux; mais nul autre juge de paix ne siégera ni ne prendra part à l'affaire, si ce n'est dans le cas d'absence de ces deux juges, ou de l'un d'eux, non plus que dans ce dernier cas, à moins que ce ne soit avec l'assentiment de l'autre." Aux termes de ces deux sections, le tribunal, constitué pour adjuger sur

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HEREAU, J.

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tux pour faire staté dans un R. L., p. 138;

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une plainte portée sous l'empire de la loi des licences, doit être composé de deux juges de paix, et une condamnation prononcée par trois juges de paix est illégale, bien que certaines prévisions de cette loi semblent faire présumer que plus de deux juges de paix peuvent faire partie de ce tribu-nal, par le motif que la juridiction ne se présume pas. Lorsque juridiction a été donnée à un tribunal, aucun autre tribunal ne peut l'exercer à sa place. Les pouvoirs accordés aux juges de paix doivent être exercés rigoureusement, suivant la loi qui les leur a donnés; autrement leurs actes ne sont pas valides, même dans le cas où les parties n'au-raient pas objecter l'incompétence des juges, parce que le fait de n'avoir pas objecté ne peut donner au tribunai une juridiction qu'il n'a pas par la loi. Les magistrats n'ont d'autre juridiction que celle que la loi leur donne et ils ne peuvent l'exercer que de la manière prévue par elle. (Paige, req., et Griffith, receveur du revenu de l'Intérieur, C. S., Sherbrooke, 1873, Sanborn, J., 18 J., p. 119; 23 R. J. R. Q., p. 258.)

ACTE DES LICENCES. Une condamnation, portée sous l'empire de la loi des licences, S. Q. de 1870, 34 Vict., ch. 2, doit être séparée de la plainte. (Paige et Griffith, C. S., Sherbrooke, 1873, SANBORN, J., 18 J., p. 119; 23 R. J. R. Q., p. 258.)
ACTIONS DE BANQUES:—Vide USUFRUITIER.

ACTION EN DOMMAGES: - Vide ARRESTATION MALICIBUSE.

Droit D'ACTION. POUR TORTS PERSONNELS:-Vide Dé-

PENS. EN GARANTIE. Quoiqu'il soit désirable que la demande principale et celle en garantie soient jugées conjointement, cependant le défendeur en garantie ne peut forcer ses adversaires à procéder ain-i, à moins qu'il n'intervienne dans la cause, qu'il ne plaide à l'action du demandeur principal et ne reconnaisse son obligation comme garant. Dans ce cas seul, il devient jusqu'à un certain point dominus litis et exerce un certain contrôle sur la procédure. Mais s'il nie le droit d'action en garantie, il s'enlève, par là, une issue principale qu'il est loisible au demandeur en garantie de faire avant celle de la demande principale, en prouvant qu'il est garant, en supposant et prouvant la véri-té des allégations principales de la demande en chef, et en priant conditionnellement à ce qu'il soit condamné à l'indemniser de toute condamnation éventuelle sur la demande principale. (Banque Nationale vs Banque de la Cité, et Banque de la Cité, demanderesse en garantie, vs Banque de Montréal, défenderesse en garantie, C. S. R., Québec, 16 janvier 1873, POLETTE, J., TASCHEREAU, J., et DUNKIN, J., 17 J., p. 197, et 23 R. J. R. Q., p. 161.)
EN REDDITION DE COMPTe: — Vide MINKUR.

REINTEGRANDE. Une action en réintégrande, portée contre une corporation municipale et dans laquelle le demandeur réclame la po-session de son terrain et des dommages, doit être maintenue même dans le cas où il n'y aurait pas en dépossession, si les conclusions de cette action contiennent tout ce qui est nécessaire dans une action en complainte. (Doyon et Corporation de la paroisse de Saint-Joseph, C. B. R., en appel, Québec, 20 mars 1873, DUVAL, J. en C., DRUMMOND, J., BADGLEY, J., et MONE, J., infirmant le jugement de C. S., Québec, 13 juin 1872, Bossé, J., 17 J., p. 193; 4 R. L., p. 684, et 23 R. J. R. Q., p. 156.) EN REINTEGRANDE:—Vide DOMMAGES.

s licences, doit condamnation e, bien que cerprésumer que rtie de ce tribue présume pas. nal, aucun autre pouvoirs accor rigourensement, nent leurs actes les parties n'auges, parce que le au tribunai une magistrats n'ont r donne et ils ne révue par elle. nu de l'Intérieur, , p. 119; 23 R. J.

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sons l'empire de . S., Sherbrooke, . Q., p. 258.)

BUSE. NELS:-Vide Dk.

e la demande prines conjointement, e peut forcer ses qu'il n'intervienne on du demandeur on comme garant. un certain point e sur la procédure. tie, il s'enlève, par au demandeur en inde principale, en t prouvant la vérinde en chef, et en condamné à l'in-lle sur la demande rue de la Cité, et ntie, vs Banque de k., Québec, 16 jan-DUNKIN, J., 17 J.,

EUR. ntégrande, portée dans laquelle le on terrain et des ans le cas où il n'y clusions de cette essaire dans une tion de la puroisse ec, 20 mars 1873, J., et MONK, J., uin 1872, Bosse, J., Q., p. 156.)

ACTION EN SEPARATION DE CORPS. Pendant l'appel d'un jugement renvoyant une action en séparation de corps, la Cour d'Appel n'accordera pas une provision à la femme demanderesse en cour inférieure. (Villeneure et Bédard, C. B. R., en appel, Québec, décembre 1870, 2 R. L., p. 626: 1 R. C, p. 122; 23 R. J. R. Q., p. 322.)

SEPARATION DE CORI'S:—Vide Preuve.

HYPOTHECAIRE. L'art. 1571 C. C. ne s'applique pas à une action hypothécaire fondée sur un transport qui n'a pas été signifié, lorsque le d'fendeur ne fait que plaider qu'il n'est pas propriétaire. (Gibeau vs Dupuis, C. S. R., Montréal, 31 mars 1874, Johnson, J., Mackay, J., et Beaudry, J., confirmant le jugement de C. S., Montréal, 27 septembre 1873, Tannare I. 18. L. 101, 28 P. J. 101

TORRANCE, J., 18 J., p. 101; 23 R. J. R. Q., p. 500.) HYPOTHECAIRE. Lorsque, dans une action en déclaration d'hypothèque, le défendeur plaide qu'il n'est plus le détenteur de l'immeuble hypothéqué, mais qu'il l'a revendu à un second acheteur, le demandeur a droit, par une nouvelle action portant le même numéro, d'assigner ce second acheteur et de le faire condamner suivant la loi comme détenteur. (Lalonde et Lynch et al., C. B. R., en appel, Montréal, 18 février 1875, Monk, J., Taschereau, J., Ramsay, J., SANBORN, J., et Sicotte, J. ad hoc, infirmant les jugements de C. S., Montréal, 27 juin 1872 et 26 juin 1873, Beaudry, J.,

20 J., p. 158; 17 J., p. 38, et 23 R. J. R. Q., p. 56.) HYPOTHECAIRE. Un créancier hypothécaire a droit d'intenter une action en déclaration d'hypothèque contre l'acquéreur d'une propriété hypothéquée, lors même que ce dernier aurait revendu la propriété, si la revente n'a pas été enregistrée. (Lalonde et Lynch et al., C. B. R., en appel, Montréal, 18 février 1875, Monk, J., Taschereau, J., Ram-SAY, J., SANBORN, J., et SICOTTE, J. ad hoc, infirmant les jugements de C. S., Montréal, 27 juin 1872 et 26 juin 1873, BEAUDRY, J., 20 J., p. 158; 17 J., p. 38, et 23 R. J. R. Q.,

HYPOTHECAIRE: - Vide Dépens.

PAULIENNE:-Vide FRAUDE.

POSSESSOIRE. Aux termes de l'art. 946 C. P. C., il faut pour avoir l'action en complainte, être possesseur d'un héritage ou d'un droit réel, à titre de propriétaire, c'est-à dire animo sibi habendi, et qu'on soit empéché de jouir. La première chose à examiner dans une action possessoire est : si l'on est troublé dans une possession réunissant les caractères exigés par la loi. La possession requise est celle accompagnée de l'intention animo sibi habendi: elle doit être telle qu'elle fasse présumer la propriété. C'est de la propriété présumée par la possession que découle l'action possessoire. Celui qui a recours à la complainte retinendo possessionis doit avoir la propriété juridique proprement dite. D'où il suit que l'action possessoire doit être d'une chose qui ne soit ni publique, ni commune. (Girard vs Bélanger et al., C. S., Saint-Hyacinthe, 2 décembre 1871, Sicotte, J., 17 J.,

p. 263; 4 R. L., p. 467, et 23 R. J. R. Q., p. 46.) POSSESSOIRE. Le ch. 32 des S. C. de 1863, 26 Vict., intitulé: "Acte pour autoriser Hilaire Théberge à exiger des péages sur un pont qu'il a construit sur le bras sud de la rivière Yamaska, au village de la paroisse Saint-Pie," décrétait sec. 10 que: "Aussitôt que ledit pont sera ouvert, pour l'usage du public, aucune personne ne pourra ériger ou faire ériger aucun pont, pratiquer ou faire pratiquer aucune vole de passage pour le transport d'aucune per-

sonne, bestiaux ou voitures, pour lucre et profits, à travers ledit bras de la rivière Yamaska à l'endroit sus-indiqué, a un mille au-dessus et une demi-lieue au-dessous, etc." La défense que contient cette section de ne pas construire de pont dans les limites fixées, ne constitue pas un droit accordant l'exercice de l'action possessoire contre les personnes qui feront une telle construction, et n'ajoute rien à la propriété du concessionnaire qui n'est saisi que du pont. Le droit à des péages est un corollaire de la propriété du pont. Péages et pont, c'est même propriété, même possession. Il n'y a pas deux droits, deux propriétés, deux possessions. Le fait qui n'affecte aucunement la propriété et la possession du pont, lors même qu'il est susceptible de pouvoir ultérieurement diminuer les profits, ne peut donner lieu à l'action po-sessoire, mais il est soumis, comme tout fait de l'homme pouvant causer un tort, aux actions ordinaires et aux conséquences de la loi, chaque fois qu'il s'agit de condamnations qui découlent d'obligations de faire on de ne pas faire. Cette défense n'a pas, non plus, créé de servitude au profit de la propriété du concessionnaire, sur le domaine public, car la règle qui fait les rivières et les eaux choses publiques et communes, veut aussi qu'elles ne soient pas plus susceptibles de propriété privée que de servitude qui est une propriété par l'inhérence du droit de servitude à la propriété. (Girard va Bélanger et al., C. S. Saint-Hyacinthe, 2 décembre 1871, Sicotte, J., 17 J., p. 263;

4 R. L., p. 467, et 23 R. J. R. Q., p. 46.) ACTION POSSESSOIRE. Le ch. 32 des S. C. de 1863, 26 Viet., intitulé: "Acte pour autoriser Bilaire Théberge à exiger des péages sur un pont qu'il a construit sur le bras sud de la rivière Yamaska, au village de la paroisse Saint-Pie," décrétait sec. 1: "Il sera loisible au dit Hilaire Théberge, et il lui sera permis d'ériger et construire une maison de péage et une barrière, sur ou près du dit pont, et aussi de faire toutes choses nécessaires, utiles ou commodes pour soutenir et entretenir ledit pont, ériger la maison de péage et barrière, et autres dépendances suivant la teneur et le sens de cet acte." La sec. 5 décrétait que, quand le pont sera certi fié comme sûr et bon, certains péages seront prélevés. Le sec. 10 se lisait ainsi qu'il suit: "Aussitôt que ledit pont sera ouvert, pour l'usage du public, aucune personne ne pourra ériger ou faire ériger aucun pont, pratiquer ou faire pratiquer aucune voie de passage pour le transport d'aucune personne, bestiaux ou voitures, pour lucre et profit-, à travers ledit bras de la rivière Yamaska à l'endroit susindiqué, à un mille au-dessus et une demi-lieue au-dessous. à peine d'une amende de quarante chelins courants par chaque personne, animal ou voiture qui seront traversés sur un pont ou voie de passage ainsi construit et pratique pour lucre et gain; pourvu que rien de contenu dans le présent acte ne sera censé avoir l'effet de priver le public de passer ladite rivière, dans les limites susdites, à gué, en canot ou autrement, sans lucre ou gain." Il a été jugé. sous ces dispositions, que la propriété et la possession de Théberge ou de celui qui est à ses droits consistent unique ment dans le droit de perception des péages et dans les constructions constituant le pont même; qu'il est permis de construire un pont dans les limites du privilège accorde. pourvu que ce ne soit pas dans un but de gain ; que les personnes qui ont commencé à construire, dans les limites du privilège, un pont qu'elles destinent à servir de voie de

rofits, à travers t sus-indiqué, a ssous, etc." La s construire de s un droit accorre les personnes joute rien à la si que du pont. la propriété du té, même possesriétés, deux posnt la propriété et st susceptible de e, ne peut donner mis, comme tout ux actions ordine fois qu'il s'agit tions de faire on non plus, créé de nces-ionnaire, sur les rivières et les t aussi qu'elles ne privée que de serrence du droit de langer et al., C. S. re, J., 17 J., p. 263;

. 26 Vict., intitulé : l exiger des péages sud de la rivière int-Pie," décrétait Théberge, et il lui naison de péage et et aussi de faire iodes pour soutenir de péage et bareneur et le sens de l le pont sera certi ront prélevés. L itôt que ledit pont icune personne ne , pratiquer ou faire le transport d'auur lucre et profit-, ka à l'endroit susni-liene an-dessous ielins courants par ii seront traversés instruit et pratiqué intenn dans le prépriver le public de susdites, a gué, en n." Il a été jugé. t la possession de consistent unique. péages et dans les qu'il est permis de privilège accorde. e gain ; que les perdans les limites du servir de voie de

passage libre, à elles-mêmes et à d'autres, sans exiger de péages, n'érigent pas ce pont dans un but de lucre ou de gain et ne troublent aucunement la possession de celui qui est investi du privilège; que le gain ou lucre désigné par la loi n'est pas autre chose que le profit représenté par le péage exigé pour passage; que le profit que retireront les dites personnes de l'usage de leur pont n'est pas le lucre ou gain mentionné par la loi; que la prohibition contenue dans l'acte d'octroi ne constitue pas dans la personne de celui qui est investi du privilège un droit réel capable de lui donner l'action en complainte, et que tout ce à quoi se réduit son droit, dans le cas de la construction d'un pont dans les limites de son privilège, dans un but de gain, est la poursuite pour l'amende imposée par le statut. (Girard vs Bélanger et al., C. S., Saint-Hyacinthe, 2 décembre 1871, SICOTTE, J., 17 J., p. 263; 4 R. L., p. 467, et 23 R. J. R. Q.,

p. 46.) ACTION POSSESSOIRE. Notre législation n'a rien statué sur les pouvoirs des juges et des tribunaux relativement aux faits et actes des citoyens dans l'exploitation de leurs richesses, de leurs industries, de façon à diriger d'une manière spéciale l'action du pouvoir judiciaire lorsqu'on solliciterait des ordonnances de prohibition contre l'exercice de cette exploitation. Le Code de Procédure, à l'art. 21, décrète que, dans le cas où il n'y aurait aucune disposition pour faire valoir ou maintenir un droit particulier ou une juste réclamation, toute procédure qu. n'est pas incompatible avec la loi devra être accueillie et valoir. Le même code, dont les arts 946, 947 et 948 seuls parlent des actions possessoires, n'indique pas la procédure à suivre pour ces sortes d'actions. D'après l'art. 21, la procédure prescrite avant sa promulgation est donc encore en vigueur, telle qu'on la trouve dans l'Ordonnance de 1667. L'art. 1er du titre 18 de cette Ordonnance dit que "si aucun est troublé en la possession et jouissance d'un héritage, ou droit réel, ou universalité de meubles qu'il possédait publiquement, sans violence, à autre titre que de fermier ou possesseur précaire, peut, dans l'année du trouble, former complainte en cas de saisine, et nouvelleté contre celui qui lui a fait le trouble." L'art. 3 du même titre se lit ainsi qu'il suit: "Si le défendeur en complainte dénie la possession du demandeur, ou de l'avoir troublé, ou qu'il articule possession contraire, le juge appointera les parties à informer." L'art. 5 du titre 17 répute matières sommaires les demandes en complainte. L'art. 13 du même titre dit que les jugements rendus en matières sommaires sont exécutés par provision, nonobstant l'appel, en donnant caution. L'action possessoire donnée par le code est celle de l'Ordonnance. Le but en est le même: faire cesser le trouble et être maintenu dans sa possession. Le juge, par son jugement, maintient en pos-session la partie qui a le mieux justifié être en possession pendant l'année et fait défense à l'autre partie de l'y troubler à l'avenir. Ce jugement peut aussi contenir une condamnation de dommages-intérêts. L'Ordonnance fait simplement mention du jugement définitif, elle ne parle pas d'ordonnances provisoires. L'autorité de la justice n'étant interposée que pour rendre à chacun ce qui lui appartient, les parties doivent, jusqu'à ce que la réclamation soit payée, rester dans l'état où elles se trouvaient au moment qu'elle est formée. Si le demandeur est bien fondé dans sa dénonciation, le jugement sera : défense de le troubler à l'avenir maintenue dans sa possession, condamnation aux dommages; mais il n'existe aucun texte de loi, aucune règle d'équité, qui lui permette d'obtenir, avant que son droit soit complètement reconnu, une ordonnance provisoire pour contraindre à la suppression des travaux qu'il dénonce, parce qu'il prétend qu'il est exposé à un tort grave, immédiat et irréparable, sans cette injonction. (Girard vs Bélanger et al., C. S., Montréal, Saint-Hyacinthe, novembre 1871, Sicotte, J. 17 J., p. 36, et 23 R. J. R. Q., p. 43.)

Bélanger et al., C. S., Montréal, Saint-Hyacinthe, novembre 1871, SICOTTE, J., 17 J., p. 36, et 23 R. J. R. Q., p. 48.)
ACTION POSSESSOIRE. Si les officiers d'une municipalité entrent sur un immeuble pour y exécuter un procès-verbal ordonnant la réouverture d'un chemin sur cet immeuble, la Cour, sans s'occuper de la question de savoir si le chemin existe, ou même si le procès-verbal qui en ordonne la réouverture est régulier ou non, mais statuant uniquement sur le fait que le demandeur a été en possession pendant l'an et jour, maintiendra l'action possessoire intentée contre la municipalité. Un propriétaire qui a enclos dans son terrain un ancien chemin public et qui l'a possédé de cette manière pendant Pan et jour, a la possession voulue pour intenter l'action en complainte contre la municipalité, quoique la destination du chemin n'ait jamais été changée; et si, dans une telle action, le demandeur conclut simplement au paiement des dommages par lui soufferts, sans conclure ni au possessoire, ni au pétitoire, cette action est néanmoins une action possessoire. (Hall et Corporation de la rille de Léris J. en C., Caron, J., Bargley, J., Drummond, J., et Monk, J., infirmant le jugement de C. C., Stuart, J., 3 R. L., 389; 23 R. J. R. Q., 415.)

REELLE. L'action, intentée par le syndic à une succession insolvable, par laquelle il demande que certains contrats de vente d'un immeuble soient annulés comme franduleux et simulés, et que lui-même, en sa qualité de syndic, soit remis en possession de cet immeuble pour en disposer suivant la loi, est une action réelle. (Whyte vs Lynch et al., C. S., Montréal, 31 octobre 1870, Torrance, J., 17 J., p. 76,

et 23 R. J. R. Q., p. 102.)

"REELLE:—Vide JURDICTION.
ADJUDICATAIRE:—"DÉCRET.

AFFIDAVIT. Un affidavit pour capias, qui, entre autres choses, allègue que le débiteur est sur le point de quitter la "Puissance du Canada," n'est pas invalide lorsqu'on peut inférer des autres allégations que le départ doit réellement avoir lieu d'un endroit situé dans les limites de la ci-devant Province du Canada. Il n'est pas nécessaire, pour le déposant, de jurer, lorsqu'il donne son affidavit, que le débiteur se trouve véritablement dans les limites de la ci devant Province du Canada. (The Moisic Iron Co. et Olsen alias Jacobsen, C. B. R., en appel, Québec, 6 décembre 1873, Duvah, J. en C., Badelley, J., Monk, J., dissident, Tascherrau, J., et Ramsay, J., dissident, infirmant le jugement de C. S. R., Québec, Meredith, J. en C., Casault, J., et Tessier, J., dissident, qui confirmait le jugement de C. S., Québec, 2 juillet 1873, Stuart, J., 18 J., p. 29, et 23 R. J. R. Q., p. 1.)

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ARI

" :-Vide Capias.
" PREUVE.

AGENT :- " COMMUNICATIONS CONFIDENTIBLES.
ALIENATION MENTALE:-Vide TESTAMENT.

ALIMENTS. Le légataire peut disposer des choses qui lui ont été léguées comme aliments à la condition de ne pouvoir être ion aux donii, aucune règle que son droit nce provisoire vaux qu'il déà un tort grave, on. (Girard vs nthe, novembre

Q., p. 43.) alité entrent sur oal ordonnant la le, la Cour, sans emin existe, on réouverture est sur le fait que le n et jour, mainla municipalité. errain un ancien manière pendant tenter l'action en ie la destination , dans une telle ent au paiement nclure ni au post néanmoins une le la ville de Léris bre 1871, DUVAL, D, J., et MONK, J., , J., S R. L., 389;

à une succession ertains contrat« de imo franduleux et é de syndic, soit r en disposer sui-gte vs Lynch et al., cc, J., 17 J., p. 76,

res choses, allègue la "Puissance du peut inférer des lement avoir lieu i-devant Province ir le déposant, de ie le débiteur se la ci devant Pro-Olsen alias Jacob. bre 1873, Duval, t, Taschereau, J., ement de C. S. R., et Tessier, J., dis , Québec, 2 juillet . Q., p. 1.)

s qui lui ont été e no pouvoir être saisies, sans qu'il y ait défense de les aliéner. (Armstrong vs Dufresnay et al., C. S., Montréal, 30 décembre 1870, BEAUGRY, J., 3 R. L., p. 306; 23 R. J. R. Q., p. 404.)

A LIMENTS :- Vide Assurance sur la VIE.

APPEL. Il n'y a pas droit d'appel de la condamnation portée par des juges de paix sous l'empire de la loi des ficences de 1870, S. Q., 34 Vict., ch. 2. (Paige et Griffith, C. S., Sherbrooke, 1873, Sanborn, J., 17 J., p. 302; 23 R. J. R. Q., p. 255.)

L'appel ou la revision ne sont d'aucune utilité pour corriger ce qui n'apparaît pas au dossier. (Lush et al., faillis, et Riddill, syndic, et Ross, cont, C. S., Montréal, 30 novembre 1874, Jourson, J., 19 J., 104; 23 R. J. R. Q., 73.)

Le ch. 30 de S. C. de 1861, 24 Vict., intitulé: "Acte pour amender l'acte d'agriculture," décrétait sec. 1: "Appel de tout internet seule l'acte d'agriculture," decrétait sec. 1: "Appel de tout

jugement, rendu en vertu de l'acte d'agriculture ou du présent acte, pourra être interjeté à la Cour de Circuit, soit du district ou du comté dans lequel le jngement aura été rendu, ou d'aucun des comtés voisins de tel comté ou district." Ce statut de 1861 n'a pas été abrogé; la cour devant laquelle l'appel devait être porté n'a pas été changée. Le Code de Procedure Civile n'a voulu qu'énumérer les pouvoirs généraux des tribunaux en existence. La loi sur la codification ne donnait pas autorité pour modifier la constitution des cours. Le code n'a abrogé aucun des statuts par lesquels il y avait appel des cours inférieures dans des cas particuliers et sur des matières spéciales. Il ne contient aucune disposition qui, implicitement ou explicitement, ait abrogé le droit d'appel dont il est que tion dans la section ci-desus. Ce droit ne pouvait être abrogé que par des dispositions expresses. D'ailleurs, l'art. 1220 reconnaît le droit d'appel des tribunaux inférieurs, tel qu'il est réglé par les statuts particuliers concernant les tribunaux. (Péloquin vs. Lamothe, C. C., Sorel, 17 mai 1871, Sicotte, J., 3 R. L., p. 58; 23 R. J. R. Q., p. 385.)

Le délai de 25 jours à compter de la date du prononcé du juge-ment, établi par l'art. 1148 C. P. C. pour la signification de la requête en appel d'un jugement de la Cour de Circuit, est final et limitatif. (*Leduc* et *Ouellet*, C. B. R., en appel, Montréal, Québec, décembre 1870, 2 R. L., p. 626; 1 R. C., p. 122;

23 R. J. R. Q., p. 322.)

- Vide PROCEDURE AU CONSEIL PRIVE. Le tribunal, quand il le juge convenable peut ordonner un sursis dans les procédures sur la mise à exécution d'un jugement afin de permettre l'appel au Conseil Privé. (De Gaspé et al., v. Asselin, et de Gaspé et al., opps, C. S., Montréal, 31 octobre 1873, Torrance, J., 18 J., 112; 23 R. J. R. Q., 513.)

ARBITRAGE. Un arbitre ne peut, comme tel, réclamer ses honoraires de la partie qui l'a choisi, s'il n'a pas fait son rapport dans le délai mentionné dans le compromis, et s'il n'a pas prononcé et signifié aux parties la sentence arbitrale, et cela quand même la partie qui l'a employé aurait promis verbalement, lors du compromis, de lui payer tant par jour pour tout le temps qu'il agirait en cette qualité. (Maynard vs Marin, C.C., Saint-Hyacinthe, 27 février 1873. Sicotte, J., 17 J., p. 140, et 23 R. J. R. Q., p. 115.) :-Vide TUTELLE.

ARBITRE. Les arbitres ne peuvent adjuger sur les frais de l'arbitrage. (Urquhart vs Moore, C. S., Montréal, 31 mars 1873, Mackay, J., 18 J., p. 71; 23 R. J. R. Q., p. 358.) :- Vide VENTE.

ARPENTEUR. L'art, 333 C. P. C. décrète qu' " il est du devoir des experts de fixer le lieu et le temps pour procéder à l'expertise et d'en donner avis aux parties, en observant un délai d'au moins trois jours lorsque la distance du domicile des parties au lieu indiqué n'excède pas cinq lieues, et un jour additionnel pour chaque cinq lieues de plus." Les experts sont, dans tous les cas qui peuvent se présenter, tenus de donner cet avis, à moins qu'ils n'en soient formellement dispensés par les parties. Par l'art. 943 C. P. C., l'arpenteur est tenu, sous son serment d'office, de procéder de la même manière que les experts. L'arpenteur est donc tenu de donner l'avis mentionné en l'art. 333, et l'omission de cet avis constitue de sa part une faute notable qui rend nul son rapport et l'empêche d'avoir droit à ses honoraires. (Bendry vs Tomalty et al., C.C., Sainte-Scholastique, 20 mars 1873, Torranoe, J., 17 J., p. 175; 4 R. L., p. 681, et 23 R. J. R. Q., p. 148.)

ARRESTATION MALICIEUSE. Lors même que l'accusation aurait été déclarée non fondée par le grand jury, s'il est prouvé qu'il y avait cause probable et qu'il n'y a pas eu malice de la part de celui qui a causé l'arrestation, il n'y a pas lieu à l'action eu dommages. (Bélanger v. Collin, C. S., Montréal, 30 septembre 1873, Johnson, J., 18 J., 78; 23 R. J. R. Q., 465.)

ASSIGNATION. Le rapport d'un huissier, sur un bref de sommation, constatant "qu'il a pris les informations nécessaires afin de trouver le défendeur, afin de lui signifier le bref de sommation, et qu'il a été informé qu'il a laissé la province de Québec, et qu'il n'a plus de domicile dans les limites de la ville de Sorel, où il puisse faire la signification," n'est pas suffisant (le bref constatant que le défendeur était ci-devant de la ville de Sorel, maintenant absent de la province de Québec, mais possédant des biens-fonds en ladite ville de Sorel) pour autoriser la signification par la voie des journaux; en ce cas, l'action devra être déboutée sur exception à la forme. (Le Maire et le conseil de la ville de Sorel v. Newton, C. C., Sorel, 17 mai 1871, Sigotte, J., 3 R. L., 394; 23 R. J. R. Q., 418.)

ASSUCIE :- Vide Société.

ASSURANCE. Une police d'assurance ne peut être transportée que du consentement de l'assureur; un avis de ce transport n'a pas l'effet de lier l'assureur. (Cross vs British Am rica Ins. Co., C. S. R., Montréal, 30 janvier 1871, Mondreat, J., Berthe

LOT, J., et MACKAY, J., 2 R. L., p. 735; 23 R. J. R. Q., p. 362.)

CONTRE L'INCENDIE. La clause de la police, qui décrète que la compagnie ne répond pas des incendies occasionnés par tremblement de terre, ouragan et incendie de forêt, est légale, et, pour exempter la compagnie de toute responsabilité, il suffit de prouver que la perte des bâtiments de l'assuré a été causée par l'incendie des forêts voisines. (Commercial Union Ass. Co. et Canada Iron Mining & Mfg. Co., C. R. R., en appel, Montréal, 24 juin 1873, Duvat, J. en C., Drummond, J., Badgley, J., Monk, J., et Taschereau, J., infirmant le jugement de C. S., Montréal, 30 novembre 1871, MANDELET L. 18, 180, 23 R. J. R. Q. 470.

Mondelet, J., 18 J., 80; 23 R. J. R. Q., 470.)

CONTRE L'INCENDIE. Le porteur de reçus d'entrepôts dûment endossés et à lui transportés pour avances par l'entrepositaire peut faire assurer les marchandises en question dans ces reçus et réclamer l'indemnité si eiles sont détruites par un incendie, quoique les avances faites n'aient été obtenues par l'entrepositaire à l'insu du porteur, que pour le bénéfice de l'entreposeur. (Stanton et The Atna Ins Co., C. B. R., en appel, Montréal, 20 décembre 1872, DUVAL. J. en

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ransportée que du transport n'a pas h America Ins. Co., bellet, J., Berther. J. R. Q., p. 362.) police, qui décrète endies occasionnés endie de forêt, est de toute responsabâtiments de l'asts voisines. (Com-Mining & Mfg. Co., 3, Duval., J. en C., 4t Taschiereau, J., 30 novembre 1871, 0.)

us d'entrepôts dùavances par l'enndises en question eiles sont détruites es n'aient été obterteur, que pour le « Ætna Ins Co., C. 1872, Duval. J. en C., CARON, J., DRUMMOND, J., BADGLRY, J., et MONK, J., infirmant le jugement de C. S., Montréal, 21 mai 1869, 17 J., 291, 99 J. P. A. 290.

281; 23 R. J. R. Q., 230.)

ASSURANCE CONTRE L'INCENDIE. Lorsqu'une des conditions de la police exige que la preuve de la perte soit faite dans les quinze jours et déclare que, tant que cette preuve ne sera pas faite, l'assuré n'aura aucun droit d'action, la preuve faite après le délai de quinze jours, mais avant l'action, est suffisante. (Lafarge vs Liverpool, London & Globe Ins. Co., C. S. R., Montréal, 28 février 1873, MacKay, J., Torrance, J., et

sante. (Lafarge vs Liverpool, London & Globe Ins. Co., C. S.
R., Montréal, 28 février 1878, MacKay, J., Torrance, J., et
Beaudry, J., 17 J., 237; 3 R. C., 59; 23 R. J. R. Q., 204.)
CONTRE L'INCENDIE. Par le reçu donné par son agent et
rédigé ainsi qu'il suit: "Reçu de——, de Coaticook (Bureau de poste, Coaticook, la somme de \$20 comme prime d'une assurance de \$2,500 sur la propriété décrite dans la proposition datée ce jour et portant le Noposition, toutefois, devant être acceptée par le bureau des directeurs à Toronto, lesquels pourront mettre fin au contrat en tout temps d'ici à trente jours, en envoyant par la poste, un avis à cet effet à l'assuré au bureau de poste ci-dessus" la compagnie d'assurance était tenue de faire mettre à la poste, au bureau de poste à Coaticook, et non au bureau de poste à Toronto, l'avis de son refus d'accepter ladite pro-position, et, ne l'ayant pas fait, l'assuré avait droit de réclamer l'indemnité, la propriété assurée ayant été détruite par un incendie dans l'intervalle entre la mise à la poste de l'avis à Toronto et son arrivée au bureau de poste à Coaticook. (Tough et al. et Provincial Insurance Co., C.B.R., en appel, Montréal, 22 juin 1875, Dorion, J. en C., dissident, 10 décembre 1872, Sanborn, J., 17 J., p. 305; 20 J., p. 168, et 23 R. J. R. Q., p. 264.) Le juge en chef Dorron et le juge Sicotte étaient d'opinion que les mots "Bureau de poste, Coaticook," indiquaient l'adresse de l'assuré, et que les autres mots suivants: "en envoyant par la poste un avis à cet ffet à l'assuré au bureau de poste ci-dessus," signifiaient " l'envoi par la poste d'un avis adressé à l'assuré au bureau de poste ci-dessus."

SUR LA VIE. Le ch. 17 des S. C. de 1865, 29 Vict., intitulé: "Acte pour assurer aux femmes et aux enfants le bénéfice des assurances sur la vie de leurs maris et parents," décrétait, sec. 5, que "lors du décès d'une personne dont la vie est assurée, le montant de l'assurance dû sur la police, sera payable aux termes de la police ou de la déclaration comme susdit, selon le cas, et ne pourra être réclamé par aucun créancier ou créanciers que ce soit." Il a été jugé qu'aux termes de cette section l'assurance sur la vie du mari, payable en faveur de la femme et des enfants, participait de la nature des aliments et que, comme telle, elle était insaisissable et par les créanciers du mari et par les créanciers de la femme. (Vilton et Marsonin, C. B. R., en appel, Montréal, 22 juin 1874, TASCHEREAU, J., RAMBAY, J., dissident, SANBORN, J., et LORANGER, J. A., confirmant le jugement de C. S., Montréal, 21 octobre 1873, BEAUDRY, J., 17 J., p. 270; 18 J., p. 249, et 23 R. J. R. Q., p. 222.) Le juge RAMSAY était d'opinion qu'une telle assurance n'avait aucun des caractères des aliments; que les dispositions de la

section ci-dessus ne s'appliquaient qu'aux créanciers du mari, et que cette assurance pouvait être réclamée par les créanciers de la femme.

ASSUREUR:—Vide Communications confidentielles. AUTORISATION MARITALE. Lorsque le bref et la déclaration déclarent que la demanderesse est dûment autorisée par son mari, partie à l'action, le défendeur n'est pas recevable à révoquer en doute cette autorisation par une exception à la forme. (*L'ory et vir vs Plamondon et al.*, C. S., Montréal, 24 décembre 1870, Torrance, J., 17 J., p. 75, et 23 R. J. R. Q.,

p. 101.)
AVIS D'ACTION. Avant d'intenter contre une municipalité une action ré mant indemnité pour dommages causés par le mauvais état des chemins sous sa surveillance, on doit lui donner un mois d'avis de cette action. (Craig vs. Corporation de Leeds, C. S. R., Québec, 6 novembre 1871, Meredith, J., Stuart, J., dissident, et Taschereau, J., 3 R. L., p. 444; 2 R. C., p. 110; 23 R. J. R. Q., p. 526.)

D'ACTION :- Vide PROCEDURE.

DANS LES JOURNAUX. L'avis requis par les sect. 101 et 105 de l'Acte de Faillite. S. C. de 1869, 32 33 Vict., ch. 16, doit être publié dans un journal quotidien; la publication de cet avis dans l'édition hebdomadaire d'un journal quotidien n'est pas suffisante. (Hope et Frank, C. B. R., en appel, Montréal, 24 juin 1873, Duval, J. en. C., Drummond, J., Baddery, J., Monk, J., et Taschereau, J., infirmant le jugement de C. S., Montréal, 25 juin 1870, 18 J., p. 28; 14 R.L., p. 256; 23 R. J. R. Q., p. 319.)

AVOCAT:—Vide Communications confidentielles.

BANQUE: - Vide Cheque. BILLET PROMISSOIRE. Le ch. 13 des S. C. de 1870, 33 Vict., intitulé: "Acte pour amender l'acte imposant des droits sur les billets promissoires et les lettres de change," décrétait sec. 12 : " Toute personne devenant subséquemment partie à tel effet de commerce, ou la personne payant le montant y mentionné, ou quiconque en sera le porteur sans y être devenu partie, pourra payer le double droit en y apposant un timbre ou des timbres au montant de ce droit, ou au montant du double de la somme pour le paiement de laquelle les timbres sont insuffisants, et en apposant sa signa-ture ou partie de sa signature ou ses initiales, ou la date voulue, sur tel timbre en la manière et pour les fins indiquées dans la quatrième section du présent acte; et si, lors de l'instruction de quelque point, ou lors de toute enquête légale, la validité d'un billet promissoire, d'une traite ou d'une lettre de change, est contestée sur le principe que le droit exigible n'a pas été payé, ou n'a pas été payé par la partie ou à l'époque voulue, et s'il appert que le porteur de tel effet. lorsqu'il est devenu porteur, ignorait que le droit exigé n'a-vait pas été acquitté par la partie ou à l'époque voulue, tel effet sera, néanmoins, réputé valide et légal, s'il est constaté que le porteur a acquitté le double droit, tel que mentionné dans la présente section, aussitôt que ce fait est venu à sa connaissance, ou si le porteur, apprenant ce fait lors de l'instruction ou de l'enquête, acquitte immédiatement ce double droit, etc." Il a été jugé qu'aux termes de cette section la personne à l'ordre de laquelle un billet est fait, peut, quoiqu'il n'ait pas été revêtu des timbres voulus par la loi, le trans-

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x créanciers du réclamée par les

déclaration déutorisée par son pas recevable à une exception à C. S., Montréal, , et 23 R. J. R. Q.,

palité une action nsés par le mau-nce, on doit lui (Craig vs. Corpo-bre 1871, MERE-EREAU, J., 3 R. L., 26.)

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r les sect. 101 et 2 33 Viet., ch. 16, en; la publication d'un journal quorank, C. B. R., en J. en. C., DRUM-CHEREAU, J., infirjuin 1870, 18 J., 19.)

70, 33 Vict., intint des droits sur change," décrétait quemment partie ayant le montant orteur sans y être oit en y apposant le ce droit, ou au le paiement de laapposant sa signa-itiales, ou la date pour les fins indiacte; et si, lors de iteenquête légale, aite ou d'une lettre e le droit exigible la partie ou à l'é-rteur de tel effet. e droit exigé n'apoque voulne, tel Il, s'il est constaté el que mentionné fait est venn à sa fait lors de l'instement ce double le cette section la it, peut, quoiqu'il r la loi, le transporter même après l'échéance, et, en y apposant des timbres, le porteur peut en recouvrer le montant du souscripteur, s'il l'a acquis de bonne foi. (Millet va Godbout, C. C., Arthabas-kaville, 13 mai 1871, Polette, J., 3 R. L., 8; 23 R. J. R. Q.,

BILLET PROMISSOIRE. Le porteur d'un billet promissoire, nul faute de porter les timbres voulus par la loi, peut, lors même que ce

billet aurait été mis à néant par un jugement de la cour, en recouvrer le montant en plaidant la considération qu'il en a donnée. (Richard vs Boisvert, C. C., Arthabaska, 16 mai 1871, POLETTE, J., 3 R. L., 7; 23 R. J. R. Q., 367.) PROMISSOIRE. Un billet à ordre peut être, pour valeur

reçue, valablement transporté sans endossement par celui à l'ordre duquel il a été fait, et la simple délivrance du billet fait preuve d'un tel transport. (Dupuis va Marsan, C. C., Montréal, 13 mars 1872, BEAUDRY, J., 17 J., 42, et 23 R. J.

R. Q., 65.)
PROMISSOIRE: - Vide Compensation.

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PRESCRIPTION.

PROCEDURE. BORNAGE. Lorsqu'une clôture de division a existé depuis au delà de trente ans entre les propriétés à borner, et que l'un des propriétaires, tant par lui même que par ses auteurs, a pendant tout ce temps joui de sa propriété franchement, publiquement et sans trouble, ce propriétaire a droit de demander, et la Cour ordonnera, que le bornage soit fait suivant la ligne que suit ladite clôture de division. (Patenaude vs Charron, C. S., Montréal, 3) novembre 1870, Torrance, J., 17 J., p. 85; 2 R. L., p. 624; 1 R. C., p. 121, et 23 R. J. R. Q., p. 110.)

BREF D'ERREUR. La cour ne peut, sur bref d'erreur, rechercher en

dehors du dossier ce qui s'est fait pendant le procès; en conséquence, des affidavits tendant à contredire ce que contient le dossier sont inadmissibles. (Dougall et al. et La

Reine, C. B. R., Montréal, 16 septembre 1876, Dorion, J. en C., Monk, J., Sanborn, J., Tressier, J., et Bélanger, J. ad hoc, 22 J., p. 133; 23 R. J. R. Q., p. 492.)

BREVET D'INVENTION. Le ch. 34 des S. R. C. de 1859, intitulé: "Acte concernant les patentes ou brevets d'invention," décrétait, sec. 10, que: " Les privilèges, clauses, dispositions, pouvoirs et recours légaux accordés et mentionnés dans cet acte, comme devant être assurés, imposés et applicables à celui ou celle qui aura inventé ou découvert aucun nouvel art utile, machine, manufacture ou composition de matière pour lesquels il ou elle demandera une patente, s'étendront à et comprendront tout sujet de Sa Majesté, étant un habitant de cette province, qui, pendant ses voyages en tous pays étrangers, aura découvert ou acquis la connaissance, ou désirera introduire en cette province aucun art nouveau et utile, machine, manufacture ou composition de matière qui n'était pas connue ni en usage en cette province, avant de l'avoir demandée; pourvu néanmoins, que rien de contenu dans cette section ne s'étendra aux inventions ou découvertes d'aucun art nouveau et utile, d'aucune machine. manufacture ou composition de matière, faite, découverte ou dont il aurait été fait usage dans les États-Unis d'Amérique, ou dans aucune partie des domaines de Sa Majesté

en Europe ou en Amérique, ni n'en empêcher la libre importation des Etats-Unis on desdits domaines de Sa Majesté, en cette province, pour y être vendus par aucune personne ou personnes, ou pour leur usage ou autrement." La sec. 11 du même chapitre se lisait ainsi qu'il suit : " Toute personne qui désirera introduire en cette province aucune invention, art, machine, manufacture ou composition de matière, qu'elle aura découverte on dont elle aura acquis la connaissance en pays étranger, avant de pouvoir obtenir une patente pour icelle, prêtera, en la manière prescrite par le présent acte à l'égard des inventeurs, une déclaration solennelle qu'elle croît être la première personne qui a introduit et publié cette invention, art, machine, manufacture ou composition de matière, en cette province, et qu'elle en a découvert et acquis la connaissance pendant ses voyages en quelque pays étranger autre que les Etats-Unis d'Amérique, ou aucune des possessions de Sa Majesté en Eu-rope ou en Amérique." La sec. 6 du ch. 11 des S. C. de 1869, 32-33 Vic., intitulé: " Acte concernant les brevets d'invention," contenait les dispositions suivantes: "Quiconque aura ré-idé depuis une année au moins en Canada quand il fera sa demande, et qui aura inventé ou découvert quelque art, machino, procédé ou composition de matière, nouveau et utile, ou quelque perfectionnement nouveau et utile à un art, machine, procédé ou composition de matière, lequel n'était pas en usage ni connu par d'autres avant qu'il en fit l'invention ou découverte, ou ne sera pas, lors de la demande du brevet, dans le domaine public on en vente dans quelqu'une des provinces du Canada, du consentement ou par la tolérance de l'auteur de l'invention on découverie, pourra, en présentant à cette fin une demande au commissaire et en remplissant les autres formalités voulues par le présent acte, obtenir un brevet lui conférant ledroit exclusif d'exploiter sa découverte ou son invention, etc." La sec. 7 du même chapitre décrétait que : " Le véritable et premier auteur d'une invention ou découverte ne sera pas privé du droit de prendre un brevet pour son invention ou sa découverte parce qu'il aura, avant de déposer sa demande, pris un brevet pour la même invention dans un autre pays, dans les six mois immédiatement antérieurs au jour où il fera le dépôt de sa spécification et de ses dessins conformément au présent acte." La sec. 39 décrétait que : " Quiconque ayant l'intention de demander un brevet, n'a pas encore parfait son invention ou découverte, et craint qu'on ne s'empare de son idée, peut déposer au bureau des brevets une description de cette invention ou découverte telle qu'elle est alors, avec ou sans plans, à son choix; et le commissaire après avoir recu le droit ci dessus prescrit verra à ce que ce document soit conservé et tenu secret; mais on en délivrera copie à la réquisition de l'inventeur ou d'un tribunal judiciaire ; le document cessera d'être secret lorsque l'inventeur obtiendra un brevet; ce document sera désigné sons le nom de Caveat; pourvu toujours que si quelque autre personne fait pour une invention ou découverte une demande de brevet à laquelle un Caveat porte obstacle en quoi que ce soit, le commissaire devra aussitôt en envoyer par la poste un avis à la personne qui aura déposé ledit Caveat, et elle devra, dans les trois mois du jour de la mise à la poste de l'avis, en cas qu'elle veuille se prévaloir du Caveat, présenter une pétition et remplir les autres formalités nécessaires pour les demandes de brevet; et si le commissaire est d'avis her la libre imes de Sa Majesté, ucune personne ient." La sec. 11 iit: "Toute perprovince aucune composition de elle aura acquis pouvoir obtenir nanière prescrite , une déclaration personne qui a chine, manufacovince, et qu'elle endant ses voya-Etats-Unis d'A-Majesté en Eudes S. C. de 1869, brevets d'inven-es : " Quiconque Canada quand il lécouvert quelque matière, nouveau vean et utile à un le matière, lequel es avant qu'il en pas, lors de la deon en vente dans consentement on ion on découverte, nande au commisités voulues par le nt ledroit exclusif on, etc." La sec. 7 ritable et premier sera pas privé du ntion ou sa décousa demande, pris autre pays, dans ı jour où il fera le conformément au Quiconque ayant on ne s'empare de ts une description lle est alors, avec ssaire après avoir que ce document délivrera copie à nal judiciaire ; le venteur obtiendra sons le nom de autre personne une demande de cle en quoi que ce royer par la poste dit Caveat, et elle nise à la poste de Caveat, présenter nécessaires pour ssaire est d'avis qu'il y a concours de demandes, on procéders en tous points de la même manière que le prescrit le présent acte pour le cas de demandes concurrentes; mais si la personne qui aura déposé un Car at n'a pas, dans les quatre ans du jour de ce dépôt, formulé une demande de brevet, le Careat de-viendra nul." Le sec. 40 se lisait ainsi qu'il suit : " Le commissaire peut refuser d'accorder un brevet dans les cas suivanta: 1. Lorsqu'il est d'opinion que l'invention ou découverte alléguée n'est pas brevetable d'après la loi ; 2. Lorsqu'il appert que l'invention ou découverte est déjà dans le domaine public, avec le consentement on par la tolérance de l'inventeur; 3. Lorsqu'il appert que l'invention ou découverte a été décrite dans un livre ou autre publication inprimée avant la date de la demande, ou qu'elle est de quelque manière dans le domaine public ; 4. Lorsqu'il appert que l'invention ou découverte a déjà été brevetée, excepté cependant, lorsque le cas tombe sous la septième clause du présent acte, ou est de ceux où le commissaire a des doutes sur la question de savoir si c'est le braveté ou le requérant qui est l'inventeur primitif." La sec. 52 déclarait que " le chapitre trente-quatre des Statuts Refondus de la ci-devant province du Canada concernant les patentes ou brevet-d'invention,... ou tout autre acte, sont par le présent abrogés, en tant qu'ils peuvent être incompatibles avec le présent acte, ou contenir des dispositions sur quelque matière réglée par le présent acte, sans préjudice des droits acquis et des pénalités encourues ou des obligations nées sous ces lois ou quelqu'une d'elles, avant que le présent acte eût force d'exécution." Jugé que les sections 10 et 11 du ch. 34 S. R. C., accordant au Canadien qui importait d'un pays étranger quelque art nouveau et utile, etc., les mêmes privilèges qu'à l'inventeur, ont été abrogées par les sections ci-dessus du Statut de 1869, par le motif que les mots découcouvrir et inventer, employés dans la teneur de ce statut, devaient être interprétés comme synonymes et que cette dernière loi ne contenait aucune disposition relative aux privilèges accordés par lesdites sec. 10 et 11; qu'ainsi le simple introducteur d'une invention brevetée aux Etats-Unis depuis plusieurs années par une autre personne, n'est pas l'auteur de l'invention ou de la découverte dans le sens attataché à ces mois par le statut de 1869, et qu'un brevet obienu par lui, en vertu de ce statut, comme étant l'auteur de cette invention ou découverte, est nul et sans effet. (Woodman et Moseley, C. B. R., en Appel, Montréal, 15 février 1875, Dorton, J. en C., Monk, J., Tascherrau, J., Sanborn, J., confirmant le jugement de C. S., Montréal, 26 septembre 1873, Beaudry, J., 17 J., 306; 19 J., 169; 23 R. J. R. Q., 268.)

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CAPIAS. Bien que, depuis la confédération, il n'existe plus de "Province du Canada," suffisant néanmoins est l'affidavit pour capias contre le capitaine d'un navire, dans lequel le déposant allègue que la défendeur est sur le point de quitter la "Province du Canada," cette expression pouvant raisonnablement s'interpréter comme signifiant la "ci-devant Province du Canada," (Milligan vs Mason, C. S. R., Montréal, 30 décembre 1872, Jonnson, J., Torrance, J., et Beaudry, J., confirmant le jugement de C. S., Montréal, 31 octobre 1872, Berthelot, J., 17 J., p. 159, et 23 R. J. R. Q., p. 126.)

CAPIAS, L'aifidavit pour capias contre le capitaine d'un navire est suffisant si le déposant jure positivement que le défendeur est le capitaine du navire et que toutes les formalités voulues par la douane pour mettre à la voile ont été remplies, sans dire que cela ait été fait par le défendeur, que ce dernier doit partir avec le nav.re, et sans nommer le lieu de destination. (Milligan vs Mason, C. S. R., Montréal, 30 décembre 1872, JOHNSON, J., TORRANCE, J., et BRAUDRY, J., confirmant le jugement de C. S., Montréal, 31 octobre 1872, BERTHELOT,

J., 17 J., p. 159, et 23 R. J. R. Q., p. 126.)

Le bref de Capias, quant à son exécution le dimanche, n'est pas régi par l'art. 786 C. P. C. (The Moisic Iron Co. et Oisen alias Jacobsen, C.B. R., en appel, Québec, 6 décembre 1873, DUVAL, J. en C., BARGLEY, J., MONK, J., TASCHEREAU, J., et RAMBAY, J., confirmant le jugement de C. S. R., Québec, MEREDITH, J. en C., CASAULT, J., et TESSIER, J., 18 J., p. 29, et 23 R. J. R.

Q., p. 1.)
L'omission de donner, dans un affidavit pour capias contre le capitaine d'un navire, les noms des personnes qui ont informé le déposant que le défendeur était sur le point de quitter, etc., bien qu'invalidant cet affidavit, si la croyance du déposant ne repose que sur cette seule information, n'a pas l'effet de le rendre nul si, comme autres motifs de sa croyance, le demandeur jure positivement que le navire du défendeur est chargé, que toutes les formalités voulues par la douane pour mettre à la voile ont été remplies, et que, de fait, le défendeur est prêt à mettre à la voile. (Miligan vs Mason, C. S. R., Montréal, 30 décembre 1872, Johnson, J., Tourance, J., et Beaudry, J., confirmant le jugement de C. S., Montréal, 31 octobre 1872, Berthelot, J., 17, p. 150, et 23 R. J. R. O., 196.)

17 J., p. 159, et 23 R. J. R. Q., p. 126.)
L'ordre du juge souscrit au bas d'un affidavit pour capias est suffisant, bien qu'il n'ordonne pas spécialement l'émission du capias et ne fasse que fixer le montant du cautionnement que le défendant devra fournir pour obtenir son élargissement. (The Moisic Iron Co. et Olsen alias Jacobsen, C. B. R., en appel, Québec, 6 décembre 1873, DUVAL, J. en C., BAIGLEY, J., MONK, J., TASCHERRAU, J., et RAMSAY, J., confirmant le jugement de la Cour de Revision, Québec, MEREDITA, J. en C., CASAULT, J., et TESSIER, J., 18 J., p. 29, et 23 R. J. R. Q., p. 1.)

Le propriétaire d'effets obtenus sous de faux prétextes par le capitaine d'un navire à bord duquei ils ont été placés et qui est aur le point mettre à la voile, peut faire décerner un bref de capius contre ce capitaine pour le recouvrement de la valeur de ces effets, son recours, dans ce cas, n'étant pas limité à l'action en revendication. (Miligan vs. Mason, C. S. R., Montréal, 30 decembre 1872, Johnson, J., Torrance, J., et Beaudry, J., 17 J., p. 159, et 23 R. J. R. Q., p. 126.)

Une requête pour casser un capias ou une saisie-arrêt avant jugement ne peut alléguer des moyens d'exception à la forme. (Lemay vs Lemay, C. S., Québec, 18 février 1871, MEREDITH, J. en C., 3 R. I., 32; 1 R. C., 246; 23 R. J. R. Q., p. 372.)

" :- Vide Compétence.
" :- Vide Juridiction.

CASSATION DE MARIAGE. Si, dans une poursuite en cassation de mariage pour impuissance, la preuve de l'impuissance est incomplète, l'époux poursuivi devra se soumettre à l'examen de médecins experts et, à son refus de le faire, les faits alle gués dans la poursuite seront considérés pro confessie et le ma-

é remplies, sans r, que ce dernier le lieu de destiéal, 30 décembre y, J., confirmant 1872, BERTHELOT,

nanche, n'est pas Co. et Olsen alias abre 1873, DUVAL, J., et Ramsay, J., ec, Meredith, J. 29, et 23 R. J. R.

r capius contre le onnes qui ont int sur le point de it, si la croyance information, n'a tres motifs de sa nt que le navire malités voulues nt été remplies, et nettre à la voile. 30 décembre 1872, J., confirmant le 72, Berthelot, J.,

it pour capias est lement l'émission du cautionnement nir son élargisse-Jacobsen, C. B. R., J. en C., BADGLEY, J., confirmant le MEREDITH, J. en , et 23 R. J. R. Q.,

c prétextes par le t été placés et qui aire décerner un recouvrement de e cas, n'étant pas lligan vs Mason, son, J., Torrance, R. Q., p. 126.) saisie-arrêt avant d'exception à la 3; 23 R. J. R. Q.,

en cassation de 'impuissance est nettre à l'examen tire, les faits alleconfessis et le mariage cassé. (Dovion et Laurent, C.B.R., en appel, Québec, 19 février 1844, Vallières de Saint-Réal, J. en C., Rolland, J., Gale, J., et Day, J., 17 J., p. 324; 23 R. J. R. Q., p. 286.) CAUSE D'ACTION. Les dommages réclamés pour la violation d'un

contrat fait en un pays étranger, mais qui doit être exécuté dans la province de Québec, ne constitue pas une dette créée en dehors de la province du Canada. Art. 806 C. P. C. The Moisic Iron Co. & Olsen alias Jacobsen, C. B. R., en appel, Québec, 6 décembre 1873, Duval, J. en C., Badgley, J., Monk, J., Tascherrau, J., infirmant le jugement de C. S. R., Québec, Мекерітн, J. en C., Casault, J., et Tessiki, J., dissident, confirmant le jugement de C. S., Québec, 2 juillet 1873, STUART, J., 18 J., p. 29, et 28 R. J. R. Q., p. 1.)

(AUTION: - Vide Contraints par corps.

"JUDICATUM SOLVI. Un demandeur qui ne réside pas dans la province de Québec est tenu de fournir au défendeur poursuivi en cette province, caution judicatum solvi. Il est également tenu de produire au dossier la procuration re-quise par l'art. 120, § 7, C. P. C. ; si le demandent ne fait cela, il est loisible au défendeur de demander, par exception dilatoire, que les procédures soient suspendues jusqu'à ce que telles caution et procuration aient été fournies, et le demandeur devra payer les frais de l'exception dilatoire. (Calvin et al. va Bestrand, C. C., Montréal, 12 mai 1873,

Braudry, J., 17 J., p. 226, et 23 R. J. R. Q., p. 192.)
CAUTIONNEMENT. Le prisonnier convaineu d'incondiat peut, en attendant qu'un point de droit soclevé au cours du procès ait été décidé, être admis à fournir caution par un juge de la Cour du Banc de la Reine, en Chambre, lequel est aussi compétent à fixer le montant du cantionnement. (La Reine vs. Coote, C. B. R., en appel, Montréal, 12 décembre 1871, Duval, J. en C., Caron, J., Badgley, J., Drummond, J., et Monk, J., dissident, 3 R. L., p. 439; 2 R. C., p. 106; 23 R. J.

R. Q., p. 501.) CENS ET RENTES. Le ch. 3 des S. C. de 1854, 18 Vict., intitulé: "Acte pour l'abolition des droits et devoirs féodaux dans le Bas-Canada," décrétait, sec. 14 : "Le, depuis et après le jour de la publication dans la Canada Gazette ou autre gazette officielle, comme susdit, de l'avis que le cadastre d'aucune reigneurie a été déposé comme susdit, tout censitaire de la dite seigneurie possédera en vertu d'icelui, son fonds en franc-aleu roturier, libre et franc de tous cens, lods et ventes, droit de banalité, droit de retrait, et autres droits et charges féodales et reigneuriales de quelque espèce que ce soit, excepté la rente constituée qui sera substituée à tous droits et charges seigneuriales, etc." La sec. 27 contenait les dispositions suivantes: "Toutes rentes constituées à être créées en vertu du présent acte auront les mêmes privilèges ex causa que le droit du bailleur de fonds, et la même préférence sur toutes autres réclamations hypothécaires affectant le bien-fonds, que tous droits seigneuriaux sur tel bienfonds ou provenant de tel bien-fonds auraient eus avant le rachat des dits droits, sans aucun enregistrement dans aucun bureau d'enregistrement à cet effet; mais le créancier n'azza pas le droit de reconvrer plus de cinq années d'arrérages de toutes telles rentes, etc." Ces deux sections out été reproduites par les S. R. B. C. de 1361, ch. 41, sect. 30 et 50. L'art. 2012 C. C. dit qu'il ne peut être réclamé que cinq années seulement et l'année courante des arrérages des droits seigneuriaux et des rentes co stituées sur la commutation des droits seigneuriaux. Jugé que le seigneur a droit

à 29 années d'arrérages des cens et rentes accrus avant le dépôt du cadastre tel que ci-dessus décrété et seulement à cinq années et la courante après ledit dépôt. (Lantier et al vs McDonald, et DeBeaujeu et al., colloqués, et Lantier et al., contestants, C. S., Montréal, 29 novembre 1873, TORRANCE, J., 17 J., p. 327; 23 R. J. R. Q., p. 288.)

CENS ET RENTES. Une action pour arrérages de cens et rentes et

CENS ET RENTES. Une action pour arrêrages de cens et rentes et rente constituée doit être considérée comme une action pur rement personnelle. (D. Bellefeuille et al. vs Mackay, C. C., Ste-Scholastique, 14 février 1871, Berrhelor, J., 3 R. L., 33; 7 R. L., 428; 23 R. J. R. Q, 373.)

7 R. L., 428; 23 R. J. R. Q, 373.)
CERTIORARI. Une con-lamnation par un juge de paix, pour avoir troublé la paix publique, avoir insulté gravement une personne et s'être porté sur elle à des voies de fait, en criant et menaçant de la battre, e-t nulle et sera cassée sur certiorari, par le motif qu'il n'existe aucune loi ou statut autoririsant une telle condamnation. (Ex parte Rouleau, C. S., Montréal, 31 octobre 1872, Torrance, J., 17 J., p. 172; 4 R. L. p. 680, et 23 R. J. R. O. p. 145.)

L., p. 680, et 23 R. J. R. Q., p. 145.) Le ch. 29 des S. C. de 1869, 32-33 Vict., intitulé: "Acte conce nant la procédure dans les causes criminelles ainsi que certaines autres matières relatives à la loi criminelle," décrétait sec. 11: "Lorsqu'il apparattra à la satisfaction de la cour, ou du juge ci-dessus mentionné, qu'il est préférable pour les fins de la justice que le procès d'une personne accusée de félonie ou de délit ait lieu dans quelque autre district, comté ou lieu que celui où l'offense est supposée avoir été commise, ou dans lequel elle serait d'ailleurs jugée, la cour devant laquelle telle personne doit être mise ou est passible d'être mise en accusation, pourra à quelqu'un de ses termes ouséances, et tout juge pouvant tenir cette cour ou y siéger, pourra en tout autre temps, ordonner, avant ou après la présentation de l'acte d'accu-ation, que le procès se fasse dans quelqu'autre district, comté ou lieu dans la même province désigné par la cour ou le juge dans tel ordre; mais cet ordre sera décerné aux conditions que la cour ou le juge croira à propos quant au paiement de tout surcroit de dépenses causé par là à l'accusé. 2. Immédiatement après que tel ordre aura été décerné par la cour ou par le juge, l'acte d'accusation, s'il a été trouvé fondé contre le prisonnier, et toutes les enquêtes, plaintes, dépositions, cautionnements et autres documents quelconques relatifs à la poursuite dirigée contre lui, seront transmis par l'officier qui en a la garde à l'officier qu'il appartient de la cour dans la localité où le procès doit avoir lieu, et toutes les procédures dans la cause seront adoptées, ou, si elles sont déjà commencées, seront continuées dans ce district, comté ou heu comme si la cause y eût pris nais-ance ou comme si l'offense y eût été commise." Lorsqu'un ordre du juge a été décerné, suivant la section ci-dessus, changeant le lieu du procès de Québec à Montréal et ordonnant que les témoignages donnés et toutes les procédures faites devant le coroner roient transmis à la Cour du Banc de la Reine à Montréal, et lorsqu'il a été donné suite à cet ordre, il n'est pas nécessaire de faire émettre un bref de certiorari pour produire le dossier devant un juge de la Cour du Banc de la Reine, en chambre, afin de pouvoir consuite faire rejeter l'enquête comme illégale, et une requête demandant, en de telles circonstances, l'émission d'un bref de artiorari ne peut être accordée. (La Reine vs. Bryndges, C. B. R., en chambre, Montréal, 11 mars 1874. RAMSAY, J., 18 J., p. 94; 23 R. J. R. Q., p. 498.)

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ccrus avant le t seulement à . (Lantier et al Lantier et al., 873, TORBANCE,

s et rentes et une action pu-Mackay, C. C., J., 3 R. L., 33;

ix, pour avoir ement une pere fait, en criant ssée sur certiou statut autori. Rouleau, C. S., J., p. 172; 4 R.

: "Acte concer nelles ainsi que loi eriminelle," a satisfaction de 'il est préférable d'une personne s quelque autre se est supposée serait d'ailleurs ne doit être mise , pourra à quelge pouvant tenir temps, ordonner, 'accu-ation, que et, comté ou lieu r ou le juge dans conditions que la paiement de tout 3. 2. Immédiate-1 par la cour ou uvé fondé contre tes, dépositions, onques relatifs à mis par l'officier partient de la ir lieu, et toutes ées, ou, si elles lans ce district, ris nais ance ou Lorsqu'un ordre ction ci-dessus, à Montréal et toutes les procémis à la Cour du été donné suite

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(La Reine vs. 11 mars 1874, CESSION DE BIENS. Le ch. 16 des Statuts du Canada de 1869, 32-33 Vict., intitulé: "Acte concernant la faillite," décrétait, sec. 110, que " le failli pourra aussi être interrogé sous serment, de temps à autre, relativement à ses biens et effets. devant le juge, par le syndic ou par un créancier quelconque. sur un ordre du juge obtenu sans avis au failli, sur requête alléguant des raisons suffisantes pour l'émission de cet ordre, etc." La sec. 112 décrétait que " toute autre personne que l'on croit en possession de renseignements à l'égard des biens ou effets du failli pourra aussi être interrogée de temps à autre sous serment, devant le juge, quant à ces biens on effets, sur un ordre du juge à cet égard, ordre que le juge pourra accorder sur requête alléguant des raisons valables en faveur de l'émission de l'ordre, sans avis an failli ou à la personne devant être ainsi interrogée." Il a été jugé, sous ces dispositions, qu'un ordre pour l'interrogatoire de témoins. donné le jour de la cession des biens d'une société faite par deux des trois associés qui composent rette société, est irrégulier, et que la requête demandant un tel interrogatoire doit alléguer des raisons suffisantes pour l'émi-sion de l'ordre. Il semble que deux des trois associés qui composent une société ne penvent faire, à un syndic provisoire, une cession volontaire des biens de cette société. (In re Lusk et al., faillis, et Foote, réq., C. S., Montréal, 19 novembre 1872, TORRANCE, J., 17 J., p. 47, et 23 R. J. R. Q., p. 73.)

HANGEMENT DE VENUE:—Vide CERTIOBAPI.

CHAUSSEE :- Vide Cours D'EAU. CHEMIN. Un chemin établi par un comté doit être maintenu sous le contrôle de ce comté, et dans les comtés de Stanstead. Brome, Missisquoi, Huntingdon et Richmond, & l'exception de certaines manicipalités mentionnées dans l'art. 1080 C. M., il doit être construit et entretenn par contribution générale sur toutes les corporations du comté, en proportion de la valeur des biens taxables, excepté dans le cas mentionné dans les arts 190 et 191; en conséquence, une répartition pour un chemin de comté, sur deux municipalités locales de ce comté, non en conformité de l'exception contenue dans les arts 190 et 191, est illégale. Arts 452, 490, 491, 529, 535, 757, 760, 785, 938 et 1080. (Ball et al. vs Corporation du comté de Stanstrad, C. C., Stanstead, 13 novembre 1873, SANBORN, J., 17 J., 312; 23 R. J. R. Q., 281.)

CHEMIN. Un conseil de comté ne peut, par procès-verbal, ordonner la confection d'un chemin dont partie doit être tracée dans une municipalité locale et partie dans une autre municipalité locale, ces deux municipalités étant situées dans le comté, sans d'abord déclarer, par résolution ou dans le procès-verbal en ordonnant la confection, que ce chemin serait un chemin de comté. (Art. 755 C. M.) (Ball et al. va Corporation du comté de Stanstead, C.C., Stanstead, 13 novembre 1873, Sanborn, J., 17 J., p. 312; 23 R. J. R. Q., p. 281.)

DE FER :- Vide RESPONSABILITÉ. DE FRONT: - Vide RESPONSABILITÉ.

PUBLIC: - Vide Action Possessoire. (HEQUE D'après l'usage universellement reconnu et suivi par les banques dans la province de Québec, un chèque tiré sur une banque et accepté soit par l'officier subsiterne préposé à l'acceptation des chèques, soit par le gérant administrateur de la banque, est considéré comme vaiable et lie cette banque d'une manière irrévocable. (Banque Nationale va Banque de la Cité, et Banque de la Cité, demanderesse en garantie, vs Banque de Montréal, défenderesse en garantie, C. S. R., Québec, 16 janvier 1873, POLETTE, J., TASCHERRAU, J., et

DUNKIN, J., confirmant le jugement de C. S., Québec, 7 juin 1872, STUART, J., 17 J., p. 197, et 23 R. J. R. Q., p. 161.)
CHEQUE. Une banque ne peut refuser le payement d'un chêque marqué des initiales de son gérant comme accepté, sous prétexte que celui-ci n'avait pas autorité pour faire cette acceptation, lorsque depuis des années, au vu et su de la banque, il a répété le même acte maintes et maintes fois. En semblable matière, l'autorité se présume, s'infère d'une ma-nière conclusive du fait que le principal, au vu et su du-quel l'acte a eu lieu, ne l'a pas répudié et a, par là, per-mis au public de croire à l'existence de l'autorité du subalterne. (Banque Nationale vs Banque de la Cité, et Banque de la Cité, demanderesse en garantie, vs Banque de Montréal, défenderesse en garantie, C.S. R., Québec, 16 janvier 1873, POLETTE, J., TASCHEREAU, J., et DUNKIN, J., confirmant le jugement de C.S., Québec, 7 juin 1872, STUART, J., 17 J., p. 197, et 23 R. J. R. Q., p. 161.)

Le paiement de chèques que le gérant d'une banque a frauduleusement marqués de ses initiales comme acceptés et pour lesquels le tireur a donné, en échange, à ce gérant, certaines garanties que la banque garde en la possession, ne peut être refusé par cette dernière, lorsque ces chèques sont pré-sentés au payement par un porteur de bonne foi oni en a donné valeur. (Banque Nationale vs Banque de la Cité, et Banque de la Cité, demanderesse en garantie, vs Banque de Montréal, défenderesse en garantie, C. S. R., Québec, 16 janvier 1873, Polletre, J., Tascherrau, J., et Dunkin, J., confirmant le jugement de C. S., Québec, 7 juin 1872, STUART, J., 17 J., p. 197, et 23 R. J. R. Q., p. 161.)
CHOSES PUBLIQUES ET COMMUNES:—Vide Action Possessoire.

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CITE DE MONTREAL. Le ch. 72 des S. C. de 1860, 29 Vict., intitulé: "Acte pour amender les dispositions des différents actes pour l'incorporation de la cité de Montrési," décrétait sec-10, § 6, que le conseil aurait le pouvoir de faire des règlements "pour régler, nettoyer, réparer, changer, élargir, rétrécir, redresser ou fermer les rues, ruelles, places, etc.," mais il ne fait pas mention d'indemnité à payer aux propriétaires riverains dans ces différents cas. Jugé que la cité de Montréal, en fermant, en vertu de cet acte, une rue à l'un de ses bouts, ne fait pas acte d'expropriation ni ne viole aucunement la propriété; qu'elle ne se rend pas coupable de voie de fait; qu'en conséquence elle ne peut être condamné à payer une indemnité à un propriétaire riverain qui prétend avoir souffert des dommages par la fermeture de cette rue à l'un de ses bouts. Jugé aussi que quel que puisse être le droit des propriétaires à des dommages, ils ne peuvent, dans ce cas, les réclamer par une action de droit commun; ces dommages doivent être fixés par les commissaires en expropriation de la manière indiquée par l'acte des S. C. de 1864, 27 et 28 Vict., ch. 66, intitulé: "Acte pour amender les actes relatifs à la corporation de la cité de Montréal, et pour d'autres fins." (Le poration de la cité de Montréal, et pour d'autres nus." (Le maire et al. de Montréal et Drummond, Conseil Privé, Londres, 16 mai 1876, Sir J. W. Colvile, Sir B. Pracock, Sir M. E. Smith, Sir R. P. Collier, infirmant le jugement de C. B. R., en appel, Montréal, 20 juin 1874, Tascherrau, J., Rambay, J., Saxborn, J., Mackay, J. ad hoc, dissident, et Tobrance, J. ad hoc, dissident, et de C. S. Wontréal, 30 sentembre 1872. Braudey, J. ment de C. S., Nontréal, 30 septembre 1872, Braudry, J., 18 J., p 225; 22 J., p. 1; 1 L. R., P. C., p. 384; 23 R. J. R. Q., p. 424.)

meau, J., et iébec, 7 juin o. 161.)

que marqué us pretexte acceptation, banque, il a s. En sem-e d'une mavn et su du-, par là, per-ité du subalet Banque de e de Montréal, janvier 1873, confirmant le r, J., 17 J., p.

que a frauduceptés et pour ant, certaines ssion, ne peut eques sont prénne foi ani en e de la Cité, et R., Québec, 16 et Dunkin, J., n 1872, STUART,

POSSESSOIRE. Vict., intitulé: lifférents actes " décrétait sec. faire des règleanger, élargir, a, places, etc.," payer aux pro-Jugé que la et acte, une rue opriation ni ne
e se rend pas
e elle ne peut
n propriétaire nmages par la lugé aussi que res à des domamer par une vent être fixés e la manière 8 Vict., ch. 60, latifs à la cor-tres fins." (Le sil Privé, Lon-BACOOK, Sir M. gement de C. , dissident, et firmé le juge-, BEAUDRY, J., 4; 23 R. J. R. CLAUSE CONDITIONNELLE. Une lettre de voiture, au dos de laquelle se trouve une clause conditionnelle limitant la responsabilité d'une compagnie de chemin de fer, a pour effet de lier l'expéditeur si ce dernier a signé sans réserve cette lettre de voiture. (Chartier et al. vs. La Cie du Grand-Tronc de chemin de fer du Canada, C. S., Montréal, 19 avril 1872, Mackay, J., 17 J., p. 26, et 23 R. J. R. Q., p. 31.)
CLOTURE DE DIVISION:—Vide Bornage.
COLLOCATION:—Vide DÉPENS.

COMMUNICATIONS CONFIDENTIELLES. Règle générale, toutes communications faites à un avocat ou à un prêtre sont confidentielles. Celles faites à un médecin ou à un agent ordidinaire ne le sont pas. Les premières ne cont pas matière à interrogatoire. Sont aussi confidentielles toutes communications faites à l'assureur par son agent relativement à la perte pour laquelle l'assure réclame une indemnité, et l'agent, interrogé comme témoin, peut refuser de répondre à toute question qui les concerne. Néanmoins si les faits que l'on veut prouver ont rapport à ce qui s'est passé entre l'assureur et le réclamant et touchent au contrat sur lequel est fondée l'action ou la réclamation, l'agent est tenu de répondre. (Pacific Mulual Ins. Co. of Nuv York va Butters, C. S., Montréal, 6 novembre 1873, Torrance, J., 17 J., 309; 23 R. J. R. Q., 277.)
CONFIDENTIELLES. Le procureur ad litem ne peut refuser

de répondre à une question touchant une affaire à laquelle il a été partie avec celui qu'il représente. Art. 275 C. P. C. de 1867, et art. 332 C. P. C. de 1897. (Ethier vs. Homier, C. S., Montréal, 31 octobre 1873, TORRANCE, J., 18 J., p. 83; 23 R.

J. R. Q., p, 470.) COMPENSATION. Celui dont on réclame le paiement d'un billet ne peut offrir en compensation une somme qu'il dit lui être due pour sa part de la récolte d'une terre dans laquelle les parties ont un intérêt commun et dont le réclamant refaserait de lui rendre compte, la compensation ne pouvant serat de la feinte conque, la compensation ne pouvain avoir lieu dans ce cas par le motif que la créance offerte en compensation n'est pas claire et liquide. (Paridad vs. Herdman, C. S. R., Montréal, 31 octobre 1871, Mondelet, J., dissident, Berthelot, J., et Mackay, J., 3 R. L., p. 440; 2 R. C., p. 106; 23 R. J. R. Q., p. 517.)

COMPETENCE. Un Juge de la Cour Supérieure, nommé ad hoc pour l'autities d'une serate de la Cour Supérieure, nommé ad hoc pour l'autities d'une serate de la Cour Supérieure, nommé ad hoc pour

l'audition d'une carse en appel et qui, conjointement avec les juges de la cour d'appel, ordonne une nouvelle audition de la cause, doit siéger, lors de la nouvelle audition, nonobstant le fait que le juge qu'il remplaçait ait donné sa démission et qu'un autre juge ait été nommé à sa place, permanemment, et il en est ainsi si un juge assistant a été nommé au lieu du juge remplacé. (Corporation de Montréal et Drummond, C. B. R., en appel, Montréal, 17 mars 1874, Taschereau, J., Rambay, J. dissident, Saldorn, J., Mackay, J. ad hoc, dissident, et Torrance, J. ad hoc, 18 J., p. 76; 5

R. L., p. 298; 23 R. J. R. Q., p. 424.) L'art. 798 C. P. C. dit que le bref de cipias est obtenu sur production de la déposition sous sern ent du demandeur, de son teneur de livres, de son commis, ou de son procureur légal. Il n'exige pas l'emploi rigoureux des termes dont il se sort pour qualifier les personnes dont la déposition est requise pour l'émission du capius. Toute autre expression montrant que le déposant est ou le demandeur, ou son teneur de livres, ou son commis, ou son procureur légal, suffit. Le demandeur, lorsque c'est lui qui dépose, n'est pas

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obligé de jurer qu'il est le demandeur ; il lui suffit de dire que c'est à lui que la dette est due. Il en est de même du commis ou du procureur légal. Le caissier d'une banque, en ne prenant que cette qualité, satisfait aux exigences de la loi. Le président et les directeurs d'une corporation sont ses procureurs légaux chargés de l'administration de ses affaires. Ils ne peuvent pas agir isolément et séparément, mais ils n'en sont pas moins les procureurs légaux, les agents de la corporation (C. C., arts 358, 359, 360). Les officiers choisis parmi les membres d'une corporation la représentent dans tous les actes, contrats, ou poursuites. L'art. 61 C. P. C. fait le président de la société par actions un des procureurs ou repré-sentants de la société auxquels doit être donnée l'assignation. Donnée à lui, en quelque endroit que ce soit, elle équivaut à celle donnée au bureau d'affaires de la société en parlant à un employé de ce bureau. L'objet de la loi est que la déposition soit donnée par une personne qui ait connaissance des faits qu'elle jure, et le président d'une corporation doit mieux que toute autre personne connaître les affaires de cette corporation. En conséquence, le président d'une corporation peut, en sa qualité de président, donner l'affidavit requis par la loi pour l'obtention d'un bref de capias. (The Moisic Iron Co. et Olsen alias Jacobsen, C. B. R., en appel, Québec, 6 décembre 1873, DUVAL, J. en C., BADGLEY, J., MONK, J., TASCHEREAU, J., et RAMSAY, J., confirmant le jugement de C. S. R., Quebec, MEREDITH, J. en C., CASAULT, J., et Tessier, J., qui avait infirmé le jugement de C. S., Québec, 2 juillet 1873, Stuart, J., 18 J., p. 29, et 23 R. J. R. Q., p. 1.)

COMPETENCE, La sec. 12 du ch. 93 des S. C. B. C. de 1861, intitulé: " Acte concernant les salaires et honoraires de certains officiers de justice, et la publication des décisions des tribunaux," impose au protonotaire de la Cour Supérieure l'obli-gation de nommer un député. "Chacun des officiers publics mentionnés dans la troisième section du présent acte," dit cette section, "qui n'est pas obligé autrement par la loi d'avoir et de nommer un député sera obligé d'en avoir et nommer un pour l'assister dans l'exercice de sa charge... Chaque tel député pourra remplir les devoirs de l'officier public qui l'a ainsi nommé son député." L'art. 17 C. C., n° 18, étend à son député les devoirs imposés et les pouvoirs conférés à un officier ou fonctionnaire public, et Part. 26 C. P. C. décrète que toutes les dispositions de Part. 17 C. C. s'appliquent au Code de Procédure. D'où il suit que le député-protonotaire est compétent à recevoir et assermenter la déposition requise pour l'obtention d'un bref de capias et à certifier ce bref. (The Moisic Iron Co. et Olsen alias Jacobsen, C. B. R., en appel, Québec, 6 décembre 1873, Duval, J. en C., Badgley, J., Monk, J., Taschereau, J., et Ramsay, J., confirmant le jugement de C. S. R., Québec, MEREDITH, J. en C., CASAULT, J., et TESSIER, J., qui avait infirmé le jugement de C. S., Quebec, 2 juillet 1873, STUART, J., 18 J., p. 29, et 23 R. J. R. Q., p. 1.)

-Vide CAUTIONNEMENT.

" NOUVEAU PROCES.
" ROLE D'ÉVALUATION.

COMPOSITION. Dans une composition avec les créanciers d'une société commerciale et les créanciers des associés individuellement, les créanciers des deux catégories dolvent être mis sur un pied égal et recevoir le même taux de composition. Hui-

chins et al., reqts décharge, et Jeffrey et al., conts., C. S., Montréal, 30 janvier 1871, Mackay, J., 2 R. L., p. 735; 1 R. C.,

p. 243; 23 R. J. R. Q., p. 363.)
CONCORDAT. Lorsqu'un créancier accepte un concordat de l'un des membres d'une société en faillite, sans décharger l'autre, qu'il obtient des garanties pour le paiement de la composition, qu'ensuite, sans le consentement de l'autre débiteur. il décharge le débiteur qui a composé et renonce à la garantie, l'autre membre de la société peut, à une action intentée contre lui par ce créancier pour recouvrer la balance de sa réclamation, opposer validement l'exception Cedendurum actionum. (Banque Molson vs Connolly, C. S., Montréal, 30 septembre 1872, Beaudry, J., 17 J., p. 189; 4 R. L., p. 683, et 23 R. J. R. Q., p. 151.)
CONSEIL DE COMTE:—Vide Chemis.

CONSENTEMENT DES PARTIES:-Vide PROCÉDURE.

CONTRAINTE PAR CORPS. La contrainte par corps ne peut être accordée sur une simple motion, bien qu'avis de cette dernière ait été dûment signifié; il faut une règle de la cour.

(Higgins vs Bell, C. S., Montréal, 26 mai 1873, Johnson, J., 17 J., p. 274, et 23 R. J. R. Q., p. 230.)

PAR CORPS. Le ch. 16 des S. C. de 1869, 32-33 Vict., intitulé:

"Acte concernant la faillite," décrétait sec. 92: "Toute personne qui achète des effets à crédit, ou qui obtient des avances d'argent, se sachant ou croyant incapable de faire honneur à ses engagements, et cachant ce fait à la personne devenant ainsi son créancier, dans l'intention de frauder cette personne, ou qui sous tous faux prétextes obtient crédit pour le paiement de quelque avance ou prêt d'argent, ou du prix ou d'une partie du prix de certains effets ou mar-chandises, dans l'intention de frauder la personne devenant ainsi son créancier, et qui n'aura pas ensuite payé la dette ou les dettes ainsi encourues, sera réputée coupable de fraude, et passible de l'emprisonnement pour le temps que la Cour pourra ordonner, n'excédant pas deux années, à moins que la dette ou les frais ne soient plus tôt acquittés." Aux termes de cette section, des marchands qui, à une époque où ils savaient qu'ils étaient incapable de faire honneur à leurs engagements, auraient acheté des marchandises pour la valeur desquelles ils ont donné leur billet, et qui, quelque temps après cet achat, font cession de leurs biens, sont coupables de fraude, et sur action par le vendeur réclamant le prix des marchandises et demandant la contrainte par corps contre les acheteurs, ils seront condamnés à la prison, à moins qu'ils ne paient plus tôt la dette, l'intérêt et les frais, ou qu'ils n'obtiennent leur décharge, et cels. lors même que le vendeur aurait déjà formulé et produit sa réclamation devant le syndic, cet acte de sa part ne le privant pas du droit de poursuite que lui accorde en ce cas ladite section. (Rogers et al. et Sancer et al., C. B. R., en appel, Montréal, 24 juin 1873, Duval. J. en C., Drummond, J., dissident, Badgley, J., Monk, J., dissident, et Taschereau, J., infirmant le jugement de C. S., Montréal, 28 juin 1872, Torbance, J., 18 J., p. 57; 28 R. J. R. Q., p. 342.)

PAR CORPS. Les cautions fournies en vertu des articles !124 et 1125 C. P. C., de poursuivre effectivement l'appel, sont des cautions judiciaires et, comme telles, elles sont passibles de la contrainte par corps. (Dumont vs Dorion et al., C. S., Montréal, 21 novembre 1871, Torr NCE, J., 3 R. L., p. 360;

23 R. J. R. Q., p. 302.) PAR CORPS. Un bref de contrainte par corps, décerné contre un huissier pour avoir négligé de faire rapport, devant la

ique, en ne es de la loi. n sont ses ses affaires. nais ils n'en de la corpoioisis parmi lans tons les . fait le préars ou repréassignation. lle équivant té en parlant est que la déconnaissance poration doit es affaires de ent d'une corner l'affidavit capias. (The .R., en appel, BADGLEY, J., offrmant le ju-C., CABAULT, J., de C. S., Qué-23 R. J. R. Q.,

iffit de dire

me du com-

1861, intitule : de certains offiions des tribupérieure l'obliofficiers publics ésent acte," dit it par la loi d'a-s d'en avoir et de sa charge... oirs de l'offi-uté." L'art. 17 imposés et les naire public, et dispositions de océdure. D'où il nt à recevoir et obtention d'un isic Iron Co. et bec, 6 décembre l'aschereau, J., . S. R., Québec, et 1873, STUART,

> rr∗ d'une société di viduellement, tre mis sur un position. Hut

cour, de ses procédés sur un bref d'exécution à lui adressé et ordonnant au shérif " d'appréhender au corps le dit mis en cause et de l'incarcérer dans la prison commune du district de Montréal, et qu'il y soit détenu jusqu'à ce qu'il ait rapporté, devant cette cour, ledit bref d'exécution avec ses procédés sur icelui, ou payé au demandeur le montant de la dette, intérêts et frais en cette cause," n'est pas suffisamment exécuté par le shérif, s'il n'a reçu de l'huissier qu'un rapport écrit de ses procédés sur le bref d'exécution, constatant que ledit huissier avait perçu du défendeur le montant porté au bref d'exécution; le shérif devait aussi exiger de l'huissier la remise des deniers qu'il avait ainsi percus. (Dufreme v. Gauthier et al, et Beaulac, huissier, mis en cause, et Mathieu, shérif, mis en cause, C. C., Montréal, 3 novembre 1870, BERTHELOT, J., 3 R. L., 428; 23 R. J. R. Q.,

CONTRAINTE PAR CORPS. Un commandement de payer et un avis que demande pour contrainte par corps sera faite faute de paiement dans le délai fixé par la loi, doivent être donnés avant l'émanation de la contrainte par corps, pour défaut de paiement du montant du jugement. (Blais vs Barbeau, C. S. Québec, 21 janvier 1871, TASCHEBEAU, J., 2 R. L., p. 787; 1 R. C., p. 246; 23 R. J. R. Q., p. 364.)
PAR CORPS. Une requête demandant contrainte par corps

contre une personne qui aurait détérioré une propriété saisie, n'est pas une instance et n'est pas sujette à la péremption. (Chaffers vs Petrin, C. S., Sorel, 5 juillet 1871,

CONVENTION ILLEGALE. Une partie coupable de félonie ne peut elle-même demander la nullité d'un acte de vente d'immeubles, faite en compromis de cette félonie. (Leblanc vs Beaudoin, et Bédard, int., C. S., Montréal, 30 novembre 1870, MACKAY, J., 2 R. L., p. 625; 1 R. C., p. 121; 23 R. J. R. Q., p. 321.)

CORPORATION MUNICIPALE. Il n'existe aucune disposition statutaire qui ait pour effet de soustraire les corporations municipales aux règles qui régissent les corporations ordinaires en matières civiles. L'art. 356 C. C. déclare que les corporations politiques sont régies par le droit public et ne tombent sous le contrôle du droit civil que dans leurs rapports, à certains égards, avec les autres membres de la société individuellement, et que les corporations civiles étant des personnes fictives sont soumises aux mêmes lois que les individus. Toute corporation municipale est une corporation politique et une corporation civile. Elle est une corporation politique en tant qu'elle a droit de faire et promulguer des règlements ou lois de police pour toute l'étendue de son territoire. Elle est corporation civile en tant qu'administrant les intérêts de ses habitants, elle pent acquérir des biens et faire tout autre contrat dans la limite des pouvoirs qui lui sont attribués, et, sous ce rapport, elle est soumise au droit commun. Dans ses relations avec les individus, en cette qualité de corporation civile, elle est responsable pour les actes de ceux qui sont autorisés à la représenter, et partant, elle peut être poursuivie pour délit, pour libelle. (Brown et al. vs Corporation de Montréal, C. S), Montréal, 30 septembre 1871, BEAUDRY, J., 17 J., p. 46; 3 R. L., p. 451; 4 R. L., p. 7; 1 R. C., p. 475, et 23 R.J.R.Q., p.69. MUNICIPALE. La construction et l'entretien d'un pont décla-

ré onvrage de comté sont à la charge des contribuables des municipalités locales intéressées dans ce pont ; ils ne peuvent lui adressé le dit mis mmune du u'à ce qu'il cution avec le montant st pas suffile l'huissier l'exécution, léfendeur le devait aussi l avait ainsi ıuissier, mis Montréal, 3 R. J. R. Q.,

er et un avis faite faute de it être donnés our défaut de Barbeau, C. S. R. L., p. 737;

nte par corps une propriété sujette à la 5 juillet 1871,

élonie ne peut ente d'immeueblanc vs Beauovembre 1870, 23 R. J. R. Q.,

sposition statuorations muniions ordinaires que les corpo-blic et ne tomleurs rapports s de la société viles étant des ies lois que les est une corpo-Elle est une oit de faire et ice pour toute ation civile en itants, elle peut dans la limite ce rapport, elle lations avec les civite, elle est t autorisés à la iivie pour délit, Montréal, C. S), 7 J., p. 46; 3 R. R.J.R.Q., p.69. l'un pont déclantribuables des t ; ils ne penvent

être à la charge des corporations locales comme corporations. (Corporation de la paroisse de Saint-André et Corporation du comité d'Argenteuil, C. B. R., en appel, Montréal, 2 mars 1871, DUVAL, J. en C., DRUMMOND, J., BADGLEY, J., et MONK, J., dissident, infirmant le jugement de C. S., Sainte-Scholastique, 15 octobre 1868, BERTHELOT, J., 3 R. L., p. 374; 13 R. L.,

p. 671; 23 R. J. R. Q., p. 409.) CORPORATION MUNICIPALE. Une corporation de comté n'a pas d'action contre une corporation locale pour le coût de la construction d'un pont déclaré ouvrage de comté, s'il n'est ni allégue ni prouvé que la corporation de comte ait payé l'entrepreneur à qui seul la dette est due, par le motif qu'il n'existe dans ce cas aucun lien de droit entre la corporation de comté et la corporation locale relativement à cette dette. (Corporation de la paroisse de Saint-André et Corporation du comté d'Argentuil, C. B. R., en appel, Montréal, 2 mars 1871, Duval, J. en C., Drummond, J., Badgley, J., et Mosk, J., dissident, infirmant le jugement de C. S., Sainte-Scholastique, 15 octobre 1868, Berthelor, J., 3 R. L. p. 374; 13 R. L., p. 671; 23 R. J. R. Q., p. 499.)
MUNICIPALE. Les lois qui donnent le pouvoir de faire certains travaux rendent légale l'exécution de ces travaux et

enlèvent tout droit d'action qui aurait pu exister s'ils avaient été exécutés sans autorisation. Ces lois, généralement, accordent dédommagement à ceux qui peuvent être lésés et indiquent la procédure à suivre dans ce cas. Tout dédommagement n'est recouvrable qu'autant qu'il a été décrété par une loi, et il ne l'est que de la manière prescrite par cette loi. (Le maire et al. de Montréal et Drummond, Conseil Privé, Londres, 16 mai 1876, sir J. W. COLVILE, sir B. Pracock, sir M. E. Smith, sir R. P. Collier, 18 J., 225; 22 J., 1; 1 L. R., A. C., 384; 23 R. J. R. Q., p. 424.)
MUNICIPALE. Une corporation de comté n'a pas droit d'acteu contre une corporation punicipal lecele pour le

d'action contre une corporation municipale locale pour le recouvrement de deniers payés pour la construction et l'entretien d'un pont (ouvrage de comté); ces deniers doivent etre perçus, au moyen d'une répartition, par le secrétaire-trésorier du conseil de chaque municipalité locale, sur les habitants ou partie des habitants à la charge desquels se trouvent la construction et l'entretien du pont, dans la forme prescrite par le ch. 24 de S. R. B. C. de 1861, sec. 59, (Corporation de la paroisse de Saint-André et Corporation du comité d'Argenteuil, C. B. R., en appel, Montréal, 2 mars 1871, Duval., J. en C., Drummond, J., Badoley, J., et Monk, J., dissident, infirmant le jugement de C. S., Sainte-Scholastique, 15 octobre 1868, BERTHELOT, J., 3 R. L., p. 374;

13 R. L., p. 671; 23 R. J. R. Q., p. 409.) MUNICIPALE. Une corporation municipale qui, mécontente de la conduite des commissaires nommés par le juge, pour déterminer l'indemnité à accorder relativement à une expropriation qu'elle requiert, demande leur destitution par une requête fondée sur une résolution de son conseil et alléguant que l'intimité des commissaires avec l'indemnitaire, pendant le litige, faisait suspecter leur impartialité, qu'ils n'avaient pas rempli leur devoir, etc., n'agit pas alors comme corps légiférant, mais comme corps administratif, ou corporation civile, et, à ce titre, elle est responsable, comme tout autre individu, pour les actes de ceux qui sont autorisés à la représenter, lo sque ces actes rentrent dans la catégorie des actes civils; partant, elle peut être poursuivie en dommages pour tout acte injurieux et portant préju-

dice. (Brown et al. vs Corporation de Montréal, C. S., Montréal, 30 septembre 1871, Braudry, J., 17 J., p. 46; 3 R. L., p. 461; 4 R. L., p. 7; 1 R. C., p. 475, et 23 R. J. R. Q., p. 69.) CORPORATION:—Vide Librille.

MUNICIPAL T:-Vide AVIS D'ACTION.

CHEMIN.

CITE DE MONTRÉAL.

66 RESPONSABILITÉ.

COUR D'APPEL :-- Vide Compétence. COUR DE CIRCUIT :- Vide ROLE D'ÉVALUATION.

COURS D'EAU. Le ch. 51 des S. R. B. C. de 1861, intitulé: "Acte concernant l'amélioration des cours d'eau," décrète que les propriétaires sont autorisés à exploiter les cours d'eau qui bordent leurs propriétés (sec. 1); qu'ils seront garants des dommages (sec. 2); que ces dommages seront constatés à dire d'experts qui pourront établir une compensation dans certains cas (sec. 3); que les travaux seront démolis, si les dommages ne sont pas payés dans les six mois de la date du rapport des experts (sec. 4). Il a été jugé, sous ces dispositions, qu'un propriétaire riverain a le droit d'utiliser une rivière traversant son immeuble et celui de son voisin, en y construisant, chez lui, des chaussées et moulins, et de les vendre à un tiers qui, lui aussi, a le droit de les exploiter; que si une chaussée a causé, par sa trop grande élévation, des dommages au voisin, ce dernier doit les faire constater par des experts à être nommés par lui et le propriétaire de la chaussée, et à défaut par l'un d'eux d'en nommer, par l'un des experts de la municipalité désigné par le préfet du comté; que les experts, en évaluant les dommages et fixant l'indemnité, peuvent, s'il y a lieu, établir une compensation, en tout ou en partie, avec la plus-value qui peut résulter, à l'immeuble du plaignant, de l'établissement d'un moulin sur cette chaussée; que cela fait et à défaut de paiement des dommages ainsi constatés et fixés, dans les six mois de la date du rapport des experts, avec l'intérêt légal à compter de ladite date, celui qui prétend avoir souffert des dommages a alors le droit de poursuivre pour le montant déjà fixe de ces dommages, avec intérêt, et pour faire démolir la chaussée ou se faire autoriser à la démolir aux frais et dépens de celui qui l'a construite; que le plaignant n'a pas droit d'action, contre le propriétaire de la chaussée, pour faire constater s'il a ou non souffert des dommages et, s'il y en a, à combien ils se montent, par les motifs que l'acte ci-dessus prescrit un mode différent de le faire qui est plus prompt et plus économique et que le plaignant ne peut demander la démo-lition de la chau-sée qu'autant qu'il aura été constaté par experts qu'il a droit à des dommages, que ces derniers auront été évalués et qu'ils n'auront pas été payés dans les six mois de la date du rapport des experts. (Blain vs Auger, et Auger, en garantie, vs Larochelle, C. S., Arthabaskaville, 1er septembre 1869, 3 R. L., p. 272; 14 R. L., p. 369; 23 R. J. R. Q., p. 395.)
CRAINTE DE TROUBLE. L'acquéreur qui craint d'être troublé ne

peut, aux termes de l'art. 1535 C. C., exiger une garantie égale à la valeur de la propriété, mais lorsqu'il a payé partie du prix de vente, il peut retenir ce qui reste dû et les intérêts jusqu'à concurrence de ce qu'il a payé, à moins que le vendeur ne fournisse caution pour le prix entier de la vente. (Farrell vs Cassin, C. S., Québec, 18 février 1871, MEREDITH, J. en C., 3 R. L., 32; 1 R. C., 246; 23 R. J. R.

Q., p. 373.)

C. S., Mont-R. Q., p. 69.)

: "Acte conécrète que les ours d'eau qui nt garants des ont constatés à pensation dans démolis, si les nois de la date , sous ces dispo-it d'utiliser une de son voisin, es et moulins, a le droit de les sa trop grande nier doit les faire ar lui et le pro-l'un d'eux d'en icipalité désigné en évaluant les t, s'il y a lieu, partie, avec la du plaignant, de ssée; que cela fait insi constatés et port des experts, te, celui qui préle droit de pourdommages, avec sée ou se faire s de celui qui l'a t d'action, contre constater s'il a ou à combien ils se essus prescrit un ompt et plus écomander la démoété constaté par que ces derniers té payés dans les ts. (Blais vs Au-C. S., Arthabas ; 14 R. L., p. 369;

> d'être troublé ne ger une garantie s lorsqu'il a payé ce qui reste dû et il a payé, à moins r le prix entier de 246; 23 R. J. R.

CRAINTE DE TROUBLE. L'acquéreur qui a joui pendant dix ans, à titre de propriétaire, d'un immeuble grevé d'hypthèques par son vendeur, ne peut refuser de payer le prix de vente pour cause de crainte de trouble résultant de l'existence de ces hypothèques, la prescription les ayant éteintes quant à lui. (Adam vs McCready, C. S., Montréal, 18 mars 1871, Маскау, J., 2 R. L., 736; 3 R. L., 448; 1 R. C., 243 et 473; 23 R. J. R. Q., 363.)

CURATEUR A INTERDIT : - Vide SAIBIR-ARRET.

A INTERDIT POUR IVROGNERIE. La femme mariée, curatrice à son mari interdit pour ivrognerie, peut être poursuivie seule; il n'est pas nécessaire de mettre le mari en cause et elle n'a pas besoin d'autorisation spéciale. (*Lemieux* vs *Forcade*, C. S., Québec, décembre 1870, Taschereau, J., 2 R. L., 626; 1 R. C., 122; 23 R. J. R. Q., 323.)

DECRET. L'adjudicataire, à une vente par le shérif, d'un terrain de 49 acres qui n'a pas la quantilé déterminée, a droit à une réduction pro rata du prix d'adjudication. Il semble qu'il en serait autrement de la vente d'un corps certain. (Doutre vs Elvidge, C. B. R., en appel, Montréal, 10 décembre 1870, DUVAL, J. en C., CARON, J., dissident, BADGLEY, J., dissident, MONK, J. et LORANGER, J., 2 R. L., 623; 1 R. C., 120 et 236; 23 R. J., R. Q., 320.)

DECRET: - Vide PRIVILEGE DU VENDEUR.

DEFENSE EN DROIT. Une défense au fond en droit qui est mal.fondée doit être rejetée, mais sans frais, s'il appert que c'est du consentement des parties qu'elle n'a pas été plaidée en temps utile et qu'elle a été réservée pour être plaidée lors de l'audition au mérite. Lorsqu'il y a défense en droit, les parties doivent, avant l'audition finale au mérite, inscrire et plaider ladite défense; elles n'ont pas le droit de la réserver pour qu'il n'en soit disposé que lors de l'argument final au mérite. (Roy et al. vs. Gauthier, C. S., Montréal, 31 mars 1873, Mackay, J., 17 J., p. 227, et 23 R.J.R.Q., p. 193.) EN DROIT :- Vide Procedure.

DELAI D'APPEL :- Vide APPEL

DELIT: - Vide Corporation MUNICIPALE.

DEMANDE SUPPLETOIRE : - Vide Procédure.

DEPENS. Aux termes des art. 2017 C. C. et 734 C. P. C., les frais en appel encourus sur le recouvrement d'une hypothèque ne sont colloqués que suivant la date de leur enregistrement. (Clark vs. Brean, et Corneil et al., opps, C. S. R., Montréal, 30 janvier 1871, Mondelet, J., Berthelot, J., et Mackay, J., 2 R. L., 734; 1 R. C., 242; 23 R. J. R. Q., 362.)

Les dépens ne peuvent s'élever à plus de \$5 dans une action en dommages pour torts personnels, dans laquelle le tribunal n'a condamné le défendeur qu'à payer \$5 de dommages. Art. 478 C. P. C. (Warner et al. vs Rolf, C. S. R., Montréal, 31 mai 1873, MACKAY, J., TORRANCE, J., et BEAUDRY, J., infirmant, quant aux frais, le jugement de C. C., Sherbrooke, 3 avril 1873, Sanborn, J., 17 J., p. 292, et 23 R. J. R. Q.,

Lorsque, dans une action en déclaration d'hypothèque contre le premier acquéreur d'un immeuble, ce dernier plaide et prouve qu'il y a eu revente de l'immeuble, que cette revente n'a pasété enregistrée, et qu'il n'est plus détenteur de la propriété, il devra payer les frais de l'action jusqu'à la production de son plaidoyer, et le demandeur sera condamné à

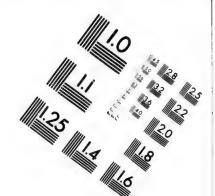
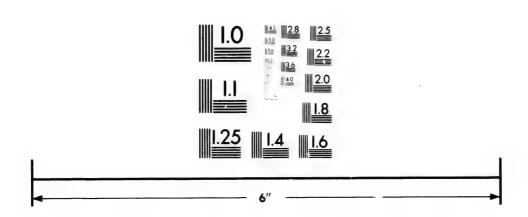


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payer au défendeur les frais de la contestation après la production du dit plaidoyer. (Lalonde et Lynch et al., C. B. R., en appel, Montréal, 18 février 1875, Monk, J., Tascherrau, J., Ramsay, J., Sanborn, J., et Sicotte, J. ad hoc., infirmant les jugements de C. S., Montréal, 27 juin 1872 et 26 juin 1873, Beaudry, J., 20 J., p. 158; 17 J., p. 38, et 23 R. J. R. Q., p. 56.)

DÉPENS. :- Vide ARBITRE.

" :- " CAUTION judicatum solvi.

· · · · · Défense en droit.

. :- " FRAIS EN APPEL.

DÉPENSES D'ELECTION. Le ch. 17 des S. C. de 1860, 23 Vict., décrétait, sec 6: "Tout contrat ou toute promesse ou toute entreprise exécutoire, se rapportant en aucune manière, ou provenant, ou dépendant d'aucune élection parlementaire, même pour le paiement de dépenses légales, ou l'exécution de tout acte légal, sera nul en loi; mais cette disposition ne mettra aucune personne en état de recouvrer aucun argent payé pour des dépenses légitimes se rattachant à telle élection." Il a été jugé sous les dispositions de cette section, lesquelles n'ont pas été abrogées par l'Acte de la Confédération, sec. 41, et ont été étendues à toutes les provinces per le ch. 20 des S. C. de 1871, 34 Vict., sec. 2 et 9, qu'un restaurateur n'a pas d'action contre un candidat pour avoir, pendant une élection, fourni des rafraîchissements à une bande d'hommes réunis par ce candidat pour se rendre tiles au cas de besoin pendant l'élection. (Johnson et vir ve Drummond, C. C., Montréal, ler avril 1872, Torrance, J., 17 d. p. 176: 4 R. L. 682 et 23 R. J. R. O., 150.

J., p. 176; 4 R. L., 682, et 23 R. J. R. Q., p. 150.) D'ELECTION. Le ch. 17 des S. C. de 1860, 23 Vict., intitulé : "Acte pour mettre un terme aux menées qui se pratiquent aux élections," décrétait, sec. 3: "Et attendu que des doutes peuvent s'élever sur la permission ou la prohibition de par la loi de louer des attelages (teams) et des voitures pour transporter des électeurs, aller et retour, aux polls, et payer leurs passages par chemins de fer, et autres dépenses des électeurs, à ces causes, il est déclaré et ordonné que le louage ou la promesse de payer ou le paiement d'aucun cheval, attelage, (team), voiture, cab ou autre moyen de transport par aucun candidat, ou par aucune autre personne, de sa part, aux fins de transporter, aller ou retour, des électeurs au poll ou près du poll, ou dans les environs du poll, à une élection quelconque, ou le paiement par aucun candidat ou par une autre personne, de sa part, des dépenses de voyage ou autres d'aucun électeur pour se rendre à une élection ou s'en retourner, seront des actes illégaux, et la personne qui les aura commis, etc." La sec. 6 décrétait: "Tout contrat ou toute promesse ou toute entreprise exécutoire, se rapportant en aucune manière, ou provenant, ou dépendant d'aucune élection parlementaire. même pour le paiement de dépenses légales, ou l'exécution de tout acte légal, sera nul en loi; mais cette disposition ne mettra aucune personne en état de recouvrer aucun argent payé pour des dépenses légitimes se rattachant à telle élection." Il a été jugé, sous les dispositions de ces deux sections qui n'ont été abrogées ni par la sec. 129 de l'Acte de la Confédération, ni par les sec. 2 et 9 du ch. 20 des S. C. de 1871, 34 Vict., qu'un billet donné en paiement des dépenses de voitures, etc., faites pendant une élection parlementaire, est nul et sans valeur. (Willett vs de Grosbois, C. S., Montréal, 31 mars 1873, MACKAY, J., 17 J., p. 293, et 23 R. J. R. Q. p. 244.)

on après la proet al., C. B. R., ., TASCHEREAU, hoc., infirmant et 26 juin 1873, 23 R. J. R. Q.,

23 Vict., décréesse ou toute enune manière, ou n parlementaire, s. ou l'exécution te disposition ne rer aucun argent ant à telle élecde cette section, e de la Confédées les provinces ec. 2 et 9, qu'un didat pour avoir, nissements à une t pour se rendre (Johnson et vir ve TORRANCE, J., 17 150.)

23 Vict., intitulé : qui se pratiquent du que des doutes rohibition de par les voitures pour ux polls, et payer tres dépenses des ordonné que le paiement d'aucun autre moyen de ucune autre perr, aller ou retour, dans les environs paiement par au-e, de sa part, des électeur pour se seront des actes is, etc." La sec. 6 sse ou toute entree manière, ou pron parlementaire, es, ou l'exécution ette disposition ne vrer aucun argent chant à telle élece ces deux sections e l'Acte de la Condes S. C. de 1871, des dépenses de parlementaire, est s, C. S., Montréal, et 23 R. J. R. Q., DÉPENSES DE MENAGE :- Vide RESPONSABILITÉ.

DEPOT :- Vide Procédure.

EN REVISION :- Vide REVISION.

DESAVEU. Le défendeur n'a aucun intérêt ni aucun droit à dénier ou à mettre en question le pouvoir du procureur ad litem du demandeur d'intenter l'action. (Leory et vir vs Flamondon et al., C. S., Montréal, 24 décembre 1870, TORRANCE, J., 17 J.,

p. 75, et 23 R. J. R. Q., p. 101.)

DETOURNEMENT. Aux termes du ch. 117 des S. C. de 1849, 12 Vict., le régistrateur et trésorier de la maison de la Trinité de Montréal est un employé du serviée public de Sa Majesté et, s'il s'approprie frauduleusement des deniers appartenant au fonds de secours connu sous le nom de "Le fonds des pilotes infirmes de Montréal," dont les maître, députémaître et syndics de la maison de la Trinité de Montréal ont, par ledit acte, le contrôle et l'administration, cette offense constitue un détournement de deniers "appartenant à Sa Majesté la Reine." (La Reine vs David, C. B. R., Montréal. 14 octobre 1873, Monk, J., 17 J., p. 310; 23 R. J. R. Q., p. 279.)

p. 279.)

DOMMAGES. Celui qui intente, contre une corporation municipale, une action en réintégrande par laquelle il réclame la possession de son terrain et des dommages, n'est pas tenu de donner l'avis d'un mois mentionué en l'art. 22 C. P. C. (Doyon et Corporation de la paroisse de St-Joseph, C. B. R., en appel, Québec, 20 mars 1873, DUVAL, J. en C., DRUMMOND, J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S., Québec, 13 juin 1872, Bossé, J., 17 J., p. 193; 4 R. L., p.

684, et 23 R. J. R. Q., p. 156.)

" :- Vide Cours d'EAU.
" NÉGLIGENCE.

DROIT D'ACTION. Les travaux que des individus ont faits dans une rivière navigable et flottable, peuvent les exposer à une mise en accusation devant une cour de justice pour avoir obstrué la voie publique, mais non à des poursuites privées de la part de personnes qui se prétendent intéressées à faire enlever ces obstructions. Une telle action ne compète à des particuliers que lorsqu'ils souffrent un tort considérable, personnel et actuel. (Girard vs Bélanger et al., C. S., Saint-Hyacinthe, 2 décembre 1871, Sicotte, J., 17 J., p. 263; 4 R. L., p. 467, et 23 R. J. R. Q., p. 46.)

D'ACTION. Lorsque, sur commande donnée à Kamouraska à un commis-voyageur ayant commission de plusieurs maisons de commerce de Montréal et ensuite acceptée par l'une de ces maisons, les marchandises commandées ont été livrées à la gare du Grand-Trone, à Montréal, et expédiées par ce chemin à l'acheteur demeurant à Kamouraska, le droit d'action a pris naissance à Montréal. (Lapierre vs Gaurreau, C. S. R., Montréal, 31 janvier 1873, Johnson, J., Mackay, J., et Beaudney, J., infirmant le jugement de C. S., Montréal, 3 novembre 1872, Torrance, J., 17 J., p. 241;

Montréal, 3 novembre 1872, Torrance, J., 17 J., p. 241; 3 R. C., p. 78, et 23 R. J. R. Q., p. 209.)

D'ACTION. Quand il s'agit de condamnation pour torts et dommages, il faut que le fait en dispute ait réellement eu lieu et qu'il y ait preuve d'un dommage actuel, sinon l'action pour dommages ne peut être exercée. L'intention de violer le droit d'une partie, si toutefois elle existe, est chose que la loi ne peut atteindre par des condamnations pécuniaires. (Girard vs Bélanger et al., C. S., Saint-Hyacinthe, 2 décembre 1871, Sicotte, J., 17 J., p. 263; 4 R. L., p. 467, et 23 R. J. R. Q., p. 46.)

DROITS SEIGNEURIAUX :- Vide Usufruitier

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ELECTION: - Vide DÉPENSES A UNE ÉLECTION.

EMPRISONNEMENT ILLEGAL. Tant qu'une condamnation, qui paraft valide, est en pleine force et vigueur et n'a pas été annulée ou cassée, il n'y a pas d'action pour emprisonnement illégal. (Huard vs Dunn, C.S., Québec, 2 février 1871, STUART, J., 3 R. L., p. 28; 1 R. C., p. 247; 23 R.J.R.Q., p. 370.)

ENFANT :- Vide Substitution.

ENREGISTREMENT. La nullité décrétée par l'art. 2098 C. C. pour défaut d'enregistrement du titre d'acquisition n'est pas absolue. Le nouvel acquéreur est toujours devenu propriétaire, même par le seul consentement, suivant l'art. 1472, mais il ne peut prescrire, il ne peut ni vendre ni hypothéquer l'immeuble au détriment de ses créanciers ou de ceux de son auteur. Cependant il possède de facto, il fait les fruits siens, il peut poursuivre en complainte, en réintégrande, il peut porter une action négatoire ou confessoire, il pent enfin protéger sa possession par tous les moyens légaux. (Laterrière et Gagnon, C. B. R., en appel, 1872, 23 R. J. R. Q., p. 60.)

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- Vide Societé.

ERREUR DANS UN JUGEMENT. Une erreur dans la description de biens immeubles, dans un jugement en ordonnant le partage, n'est pas une cause de nullité. Cette erreur peut être rectifiée en appel par le jugement de la Cour d'Appel, avec dépens contre l'appelant. (*Péloquin et al.* et *Brunet et al.*, C. B. R., en appel, Montréal, 9 septembre 1871, Duval, J. en C., Caron, J., Drummond, J., Badgley, J., et Monk, J., 3 R. L., 52 et 386; 23 R. J. R. Q., p. 378.)

EVOCATION. Le défendeur, dans une cause non appelable et rapportable hors de terme, peut en demander et obtenir l'évocation en tout temps avant que le demandeur ait obtenu

un acte de forclusion. Art. 1130 C. P. C. de 1897. (DeBeaujeu et vir vs McNamee, C. S., Montréal, 20 novembre 1872,
MACKAY, J., 17 J., p. 50, et 23 R. J. R. Q, p. 76.)

EXAMEN DES TEMOINS. Quoiqu'il soit irrégulier d'attaquer le témoignage donné par un témoin en sous-contrepreuve, il pent être permis de le faire dans un cas exceptionnel, pour démontrer que ce témoin était hostile à la partie adverse et n'était pas croyable sous serment. (Payette vs Cousineau, C. S., Montréal, 31 mars 1873, MACKAY, J., 17 J.,

p. 287, et 23 R. J. R. Q., p. 237.) EXCEPTION DECLINATOIRE: — Vide Procedure.

DILATOIRE:—Vide CAUTION judicatum solvi.

A LA FORME. Le demandeur ne peut, à l'audition finale au mérite d'une exception à la forme, être admis à faire motion pour amender le bref et la déclaration. (Clemow

et al. vs McLaren et al., C. S., Montréal, 17 décembre 1872, MACKAY, J., 17 J., p. 328; 23 R. J. R. Q., p. 290.)

A LA FORME. On peut plaider à une déclaration amendée par une exception à la forme et la production subséquente de plaidoyers au mérite ne constitue pas un désistement de l'exception produite. (Brown vs Imperial Fire Insurance Co., C. S., Monuréal, 27 mai 1873, Johnson, J., 17 J., p. 323; 20 J., p. 179; 23 R. J. R. Q., p. 283.)
EXECUTEUR TESTAMENTAIRE. Les dispositions de l'art. 924 C.C.,

relatives à la nomination d'un exécuteur testamentaire, pour remplacer ceux qui ont cessé d'exercer leurs pouvoirs, ne s'appliquent pas aux cas qui peuvent se présenter sous pec, 2 février 1871, R.J.R.Q., p. 370.)

2098 C. C. pour tion n'est pas abvenu propriétaire, l'art. 1472, mais il hypothéquer l'imu de ceux de son ait les fruits siens, ntégrande, il peut enfin progaux. (Laterrière J. R. Q., p. 60.)

s la description de ordonnant le parte erreur peut être Cour d'Appel, avec tl. et Brunet et al., re 1871, Duval, J. y, J., et Monk, J.,

pelable et rapporr et obtenir l'évoandeur ait obtenu le 1897. (*DeBeau-*20 novembre 1872,

p. 76.)
lier d'attaquer le
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ment. (*Payette* vs
MACKAY, J., 17 J.,

audition finale au re admis à faire aration. (Clemow 7 décembre 1872, . 290.)

laration amendée stion subséquente s un désistement rial Fire Insurance s, J., 17 J., p. 323;

de l'art. 924 C.C., ir testamentaire, er leurs pouvoirs, se présenter sous les dispositions d'un testament fait antérieurement à la promulgation du Code Civil. Sous l'ancienne loi, la cour n'avait pas le pouvoir de nommer d'exécuteur, lorsque, pour une cause ou pour une autre, l'exécuteur nommé par le testament ne voulait pas agir. (Ex parte Chalut et al., reqs, et Persillier dit Lachapelle, répondant, C.S., en chambre, Montréal, 8 juillet 1872, Torrance, J., 17 J., p. 44, et 23 R.J.R.Q., p. 67.)

p. 67.)

EXÉCUTION:—Vide JUGEMENT INTERLOCUTOIRE.

"DE JUGEMENT:—Vide VENTE DE CRÉANCES.

EXPERT. Les experts sont tenus de donner l'avis requis par l'art. 333 C. P. C., à moins qu'ils n'en soient dispensés formellement par les parties. (Braudry vs Tomalty et al., C. C., Sainte Scholastique, 20 mars 1873, Torrance, J., 17 J., p. 175, et 23

R. J. R. Q., p. 148.)

EXPROPRIATION. Le procès-verbal, en vertu duquel une corporation municipale s'est emparé du terrain d'un particulier, pour l'utiliser comme chemin public, est nul s'il n'a pas été précédé des formalités voulues, par le motif que les formalités imposées par le statut, concernant l'ouverture d'un chemin et l'expropriation, doivent être suivies rigoureusement et que, lorsque la loi prescrit qu'une chose sera faite d'une certaine manière, il est non seulement de l'intérêt et de l'avantage de tout le monde de se conformer à ses prescriptions, mais tout ce qui sera fait en violation sera considéré comme une nullité. (Doyon et Corporation de la paroisse de Saint-Joseph, C. B. R., en appel, Québec, 20 mars 1873, Duval. J. en C., Drummond, J., Badgley, J., et Monk, J., confirmant le jugement de C. S., Québec, 13 juin 1872, Bossé, J., 17 J., p. 193; 4 R. L., p. 684, et 23 R. J. R. Q., p. 156.)

:- Vide Tierce opposition.

F

FAITS ET ARTICLES. Lorsque des interrogatoires sur faits et articles ont été signifiés à l'avocat d'une partie absente, cet avocat, en n'indiquant que le lieu de résidence de l'absent, a agi en conformité de l'art. 223 C. P. C., aux termes duquel il n'est pas tenu de faire des démarches pour l'interrogatoire de son client. (Walters vs Lyman et al., C. S., Montréal, 28 février 1873, Jonnson, J., 17 J., p. 246, et 23 R. J. R. Q., p. 213.)
FAUN. Le changement du montant de \$500 d'un billet en \$2500 cons-

FAUX. Le changement du montant de \$500 d'un billet en \$2500 constitue le faux d'un billet de \$500. Un billet à ordre qui a été endossé et que le souscripteur a, depuis l'endossement, altéré en changeant, à l'insu de l'endosseur, le montant primitif, est un billet contrefait, quoique l'endosseur seul ait pu être fraudé, et cette altération ne constitue pas un faux de l'endos-ement, mais du billet de l'endosseur. (La Reine vs McNerin, C. B. R., ju-tice criminelle, Montréal, 2 octobre 1867, BADGLEY, J., 2 R. L., 711; 23 R. J. R. Q., p. 324.)

Quoiqu'il y ait de fortes preuves que le reçu, produit par l'une des parties, ait été fabriqué, ce reçu sera cependant accepté comme valable, s'il n'est produit aucun affidavit à l'encontre. (Brunet vs Brunet, C. S., Montréal, 29 novembre 1873, MACKAY, J., 5 R. L., p. 466, et 23 R. J. R. Q., p. 78.):—Vide Prockdure.

FELONIE: - Vide Convention Illégale.

FEMME MARIEE :- Vide Assurance sur la vie.

MARIEE :- " CURATEUR A INTERDIT POUR IVROGNERIE.

FEMME SEPAREE DE BIENS :- Vide PREUVE TESTIMONIALE.

FOL! E :- Vide TESTAMENT.

FRAIS D'APPEL. Toute partie a droit à ses frais d'impression faite en appel et taxée à raison de \$2 par page, lors même qu'elle aurait payé à son imprimeur une somme moindre par page.

(O'Gilvie et al. et Jones, C. B. R., en chambre, Montréal, septembre 1872, Monn, J., 17 J., 25, et 23 R. J. R. Q., 31.)

DANS LES AFFAIRES MUNICIPALES. Les frais dans une

DANS LES AFFAIRES MUNICIPALES. Les frais dans une demande par voie de requête en cassation d'un règlement municipal doivent être taxés comme dans une cause de première "lasse, non appelable, de la Cour de Circuit. (Bourbonnais et al. et Corporation du Comté de Soulanges, C. C., Montréal, 16 mai 1872, MACKAY, J., 17 J., p. 69, et 23 R. J.

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R. Q., p. 99.)

FRAUDE. La connaissance de l'insolvabilité d'un failli, au temps d'un contrat fait avec lui au préjudice de ses créanciers, doit s'inférer des circonstances dans lesquelles se trouvait alors le failli. Sa parenté avec celui avec qui il contracte doit aussi, dans ce cas, être prise en considération. (Whitney et Shaw, C. B. R., en appel, Montréal, 22 décembre 1871, Duvan, J. en C., Caron, J. Drummond, J., Badgley, J., et Monk, J., 3 R. L., 439; 4 R. L., 483; 2 R. C., 106; 23 R. J. R. Q., p. 515.) Le juge Caron était cependant d'opinion que la parenté n'est pas une présomption de fraude.

La vente d'effets mobiliers, entre parents, non suivie de déplacement et de tradition réelle, est présumée frauduleuse vis-à-vis des tiers créanciers et doit être annulée. (Davis vs Shaw, et Shaw, opp., C. S. R., Montréal, 30 novembre 1870, Mondelet, J., dissident, Mackay, J., et Beaudry, J., 2 R. L., 623; 14 R. L., 165; 1 R. C. 120: 23 R. J. R. Q., p. 320.)

La vente d'un fonds de magasin d'épiceries, faite sous contrat. à tant dans le louis, par un débiteur insolvable, poursuivi et sous le coup d'un jugement, à des tiers qui, d'après la preuve, connaissaient l'état des affaires de leur vendeur, est frauduleuse, faite en violation de la loi (Acteroncermant lo faillite, S. C., de 1869, 32-33 Vict., ch. 16, sec. 87), et doit être annulée. (Brossard et Tison et al., C. B. R., Montréal, Duvai, J. en C., Drummond, J., Badgley, J., Monk, J., et Taschereau, J., 18 J., 54; 23 R. J. R. Q., 339.)

":—Vide Chèque.

G

GAGES:— "MINEUR.
GARANTIE:—Vide DÉCRET.
"LETTRE DE GARANTIE.
GREFFIER DE LA COUR DE CIRCUIT:—Vide JURIDICTION.

U

HUISSIERS:—Vide Contrainte par corps. HYPOTHEQUE:—Vide Privilège du vendeur. '':—Vide Vente d'un vaisseau enregistré.

T

IMPUISSANCE: — Vide Cassation de Mariage. INDICATION DE PAIEMENT: — Vide Vente. INSAISISSABILITE: — Vide Aliments.

INSCRIPTION. Un avis de huit jours doit être donné à la partie adverse de l'inscription de la cause pour enquête et audition

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ES.

pression faite en ors même qu'elle ioindre par page. mbre, Montréal, J. R. Q., 31.) es frais dans une ı d'un règlement une cause de pree Circuit. (Boure Soulanges, C. C., p. 69, et 23 R. J.

lli, au temps d'un eanciers, doit s'ine trouvait alors le ntracte doit aussi, (Whitney et Shaw, re 1871, Duval, J. Y, J., et Monk, J., 6; 23 R. J. R. Q., it d'opinion que la ude.is, non suivie de

sumée frauduleuse annulée. (*Davis* vs 30 novembre 1870, EAUDRY, J., 2 R. L. R. Q., p. 320.) faite sous contrat. solvable, poursuivi iers qui, d'après la le leur vendeur, est (Acte concernant la sec. 87), et doit être

, Montréal, Duval, NK, J., et Tasche-

IDICTION.

au mérite en même temps (art. 235 C. P. C. de 1867), et le simple reçu d'une copie d'une telle inscription pour le 27 et datée du 21 du même mois ne comporte pas l'abandon du droit d'objecter ensuite à la brièveté du temps donné par l'avis. (Allair vs Mortimer, C. S. R., Montréal, 30 septembre 1872, Mackay, J., Torrance, J., et Beaudry, J., infirmant le jugement de C. S., Montréal, 17 J., p. 168; 2 R. C., p. 475, et 23 R. J. R. Q., p. 142)

INSCRIPTION :- Vide PROCEDURE.

EN FAUX. Le changement du jour du renvoi d'un bref de Venditioni exponas de Terris, fait par le protonotaire après que le shérif a déjà commencé l'exécution du bref en publiant ses procédures dans un journal, est invalide, et toutes procédures faites sur ce bref seront causées, sans qu'il y ait nécessité d'une inscription en faux. (Duchémay et al. vs. Vienne, et Vienne, opp., C. S., Montréal, 29 février 1872, Beaudry, J., 17 J., p. 82, et 23 R. J. R. Q., p. 107.) ENREVISION. Aux termes de l'art. 497 C. P. C. (art. 1196

C. P. C. de 1897), l'inscription peut être faite le neuvième jour après le jugement, lorsque le huitième jour tombe un dimanche. (Lenoir dit Rolland vs Desmarais et vir, C. S. R., Montreal, 21 décembre 1872, MACKAY, J., BEAUDRY, J., 17 J.,

p. 81, et 23 R. J. R. Q., p. 106.) EN REVISION. Une inscription qui, sur demande de la partie adverse, a été déchargée en l'absence de la partie qui avait inscrit, peut, sur motion être remise sur le rôle durant le même terme, lorsqu'il est donné raison suffisante. (Shepperd vs Buchanan, C. S. R., Montre al, 23 mai 1873, MACKAY, J., dissident, Torrance, J., et Beaudry, J., 17 J., p. 191; 4 R. L., p. 684, et 23 R. J. R. Q., p. 153.) Le juge Mackay était d'opinion que, le jugement ayant été prononcé, la cour n'était plus saisie de la cause, qu'en conséquence elle n'avait plus le pouvoir d'adjuger sur la motion.

NSOLVABILITE:—*Vide* Fraude. NTERDICTION POUR IVROGNERIE. Le ch. 26 des S. Q. de 1870, 33 Vict., intitulé: " Acte pour pourvoir à l'interdiction et à la guérison des ivrognes d'habitude," décrétait, sec. 1, que : "Sur requête assermentée présentée à l'un des juges de la cour Supérieure pour le Bas-Canada, qui seul pourra agir, de la part d'un parent, ou allié, et à défaut de parent, de la part d'un ami d'un ivrogne d'habitude, représentant que par suite de son ivrognerie, tel ivrogne d'habitude dissipe ses biens, ou administre mal ses biens, ou met sa famille dans le trouble ou la gêne, ou conduit ses affaires au préjudice des intérêts de sa famille, de ses parents, ou de ses créanciers, ou qui fait usage de liqueurs spiritueuses en quantité si considérable qu'il s'expose à ruiner sa santé et abréger ses jours, tel juge, pour aucune de ces raisons prouvée devant lui à sa satisfaction, pourra prononcer l'interdiction de tel ivrogne d'habitude, et lui nommer un curateur, afin de gérer ses biens et conduire sa personne, comme dans le cas d'une personne interdite pour cause de démence. Cette section donne au juge juridiction exclusive; lui seul peut prononcer l'interdiction pour ivrognerie habituelle. Le protonotaire ne peut, en vertu de l'art. 465 C. P. C., prononcer cette interdiction en l'absence du juge. (Thérien, req., et Lauzon, opp., C. S., Ste-Scholastique, 20 mars 1873, Torrance, J., 17 J., p. 174; 4 R. L., p. 681, et 23 R. J. R. Q., p. 147.

NTERPRETATION DE LOI. Le 🛭 15 de la section 92 de l'acte de l'A. mérique Britannique du Nord 1867, se lisait ainsi qu'il suit :

né à la partie adquête et audition

"L'infliction de punitions par voie d'amende, pénalité, ou emprisonnement, dans le but de faire exécuter toute loi de la province décrétée au sujet des matières tombant dans aucune des catégories de sujets énumérés dans cette section." Il a été jugé qu'aux termes de ce paragraphe, la législature de la province de Québec a droit, dans le but de faire exécuter les lois pénales qu'elle passe, d'imposer la pénalité ou l'imprisonnement, ou la pénalité et l'emprisonnement, suivant les circonstances et la gravité de la contravention. (Paige et Griffith, C. S., Sherbrooke, 1873, Sanborn, J., 18 J. 119; 23 R. J. R. Q., 258.)
INTERPRETATION DE LOI:—Vide RECUSATION.

:- " Syndics d'écoles.

J

JUGE :- Vide Compétence.

JUGE DE PAIX :- Vide ACTE DES LICENCES.

:- " CERTIORARI.

" JURIDICTION. JUGEMENT DE DISTRIBUTION. La requête civile, demandant l'annulation d'un jugement de distribution pour cause de dol dans la procédure suivie pour son homologation, sera accordée, et il sera permis au requérant de contester la collocation. (Doutre et al. vs Bradley et al., et divers opposants, et Allison et vir, req. sur requête civile, et Dorion, intimé, C. S. R., Montréal, 31 mai 1872, Berthelot, J., Mackay, J., et Torrance, J., confirmant le jugement de C. S., Montréal, 29 février 1872, Beaudry, J., 17 J., p. 4, et 23 R. J. R. Q., p. 66).

DES JUGES DE PAIX :- Vide APPEL INTERLOCUTOIRE. L'art. 551 C. P. C. s'applique aussi bien

au jugement interlocutoire qu'au jugement final. L'exécution d'un jugement interlocutoire portant condamnation au paiement des frais du jour, peut émaner plus de quinze jours après la date du prononcé et avant que jugement final soit rendu. Le protonotaire qui refuse peut, sur motion pour règle nisi, être contraint à délivrer l'exécution d'un tel jugement, (Trudel vs Desautels, et Contant et al., t. s., et David et al., intervenants, et Trudel, cont., et Hubert et al., mis en cause, C. C., Montréal, 2 mars 1871, Berthelot, J., 17 J., p. 56; 4 R. L., p. 701, et 23 R. J. R. Q., p. 83.) JURIDICTION. Bien que l'action réelle ne doive être portée que devant JUR

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le tribunal du lieu où l'objet litigieux est situé (art. 38 C. P. C. de 1867), une comparution, par un défendeur, sans plaider à l'action, ou en plaidant au mérite, est un abandon de son droit à l'exception déclinatoire. (Whyte ve Lynch et al., C. S., Montréal, 31 octobre 1870, Torrance, J., 17 J., p. 76, et 23 R. J. R. Q., p. 102.)

De même que les juges de la cour Supérieure, le protonotaire d'un district a juridiction pour assermenter un affidavit qui doit servir de preuve dans un autre district; cette juridiction lui est donnée par l'art. 30 C.P.C., et il n'existe aucune loi qui ait pour effet de la restreindre. (Trahan vs Gagnon et al., et Gagnon, opp., C. S. R., Québec, 31 octobre 1873, MEREDITH, J. en C., STUALT, J., et CASAULT, J., infirmant le jugement de C. S., Trois Rivières, 18 juin 1873, LORANGER, 17.1, 222, 22, L. P. G. 205 J., 17 J., 383; 23 R. J. R. Q., 295.)

En l'absence du juge, durant la vacance, le greffier de la cour de Circuit n'a pas juridiction pour accorder une requête demandant la possession provisoire d'un cheval saisi-revendiqué en fournissant caution, même dans le cas de nécessité

de, pénalité, ou écuter toute loi s tombant dans as cette section." e, la législature out de faire exéposer la pénalité nprisonnement, a contravention. ANBORN, J., 18 J.

, demandant l'anpour cause de dol gation, sera accor-ntester la collocavers opposants, et orion, intimé, C. S. J., MACKAY, J., et C. S., Montréal, 29 3 R. J.R. Q., p. 66).

applique aussi bien nt final. L'exécution damnation au paiedus de quinze jours jugement final soit it, sur motion pour ution d'un tel juget al., t. s., et David t Hubert et al., mis BERTHELOT, J., 17 J., p. 83.)

e portée que devant t situé (ait. 38 C. P. éfendeur, sans plaiest un abandon de hyte ve Lynch et al., NCE, J., 17 J., p. 76,

eure, le protonotaire nter un affidavit qui strict; cette juridicet il n'existe aucune (Trahan vs Gagnon ec, 31 octobre 1873 ULT, J., infirmant le uin 1873, LORANGER, ·)470

e greffier de la cour corder une requête n chevalsaisi-revenns le cas de nécessité

évidente et lorsqu'à raison du délai le requérant p eut sonffrir des dommages. (Larose vs Larose, C. C., Lachute, 30 mai 1871, A. LAFONTAINE, J., 3 R. L, p. 33; 23 R. J. R. Q., p.

JURIDICTION. La cour Supérieure, dans une action intentée par bref de capias pour une somme moindre que \$100, peut, même après jugement de cette cour cassant le capias, condamner le débiteur à payer la somme réclamée. (Prévost et al. vs Ritchot, C. S., Montréal, 18 mars 1874, Torrance J., 18 J.,

72; 23 R. J. R. Q., 359.)

La législature de la province a juridiction pour déterminer la procédure à suivre pour l'application des lois pénales qu'elle passe relativement à des matières comprises dans les limites de ses pouvoirs. Ces lois pénales ne sont pas parties de la loi criminelle indiquée par l'Acte de l'Amérique Bri-tannique du Nord, 1867, lequel donne au parlement du Canada le pouvoir de fixer la procédure à suivre dans les octobre 1878, Sanborn, J., 17 J., 302; 23 R. J. R. Q., p. 255.)

Quoique ce soit un principe admis que là où le titre à la pro-priété est contesté, là cesse la juridiction des juges de paix, ces derniers peuvent connaître d'une plainte dans laquelle le titre à la propriété est révoqué en doute, si le défendeur, qui oppose ce moyen, ne réclame pas ce titre comme sien ou celui de ses auteurs, mais fait valoir le droit d'un tiers. (Ex parte Cayen, req. certiorari, et Le maire et al., plaignants, et Sexton, recorder, C. S., Montréal, novembre 1870, Tor-RANCE, J., 17 J., p. 74, et 23 R. J. R. Q., p. 100.)

JURY. Lorsque l'accusé a demandé que le jury soit pour moitié composé de personnes parlant sa langue, il faut d'abord choisir les six jurés parlant la langue de l'accusé. (La Reine va Dougall

et al., C. B. R., justice criminelle, Montréal, 9, 10 et 11 avril 1874, Ramsay, J., 18 J., p. 85; 7 R. L., 187; 23 R. J. R. Q., p. 472.)

LESION :- Vide MINEUR. ETTRE DE GARANTIE. Une lettre de garantie ainsi rédigée: "S'il vous plaît remettre à.....toutes portes, chassis, etc., qu'il peut avoir besoin, et je règlerai cela," ne s'applique qu'aux avances faites pour le parachèvement de la maison alors

en voie de construction; elle ne s'applique pas aux maisons commencées subséquemment. (Long vs Brooks, C. S. R., Montréal, 30 janvier 1371, Mondelet, J., Berth Lot, J. et Mackay, J., 2 R. L., p 735; † R. C., 242; 23 R.J.R.Q., p. 362.) DE VOITURE:—Vide Clause conditionnelle.

RECOMMANDEE:— "Maitre de Poste.

66 RESPONSABILITÉ.

Dans un procès pour libelle, il ne sera pas permis à la dé-fense de prouver la vérité du libelle; il ne sera pas permis non plus, à la poursuite de faire la preuve de fausseté du IBELLE. libelle. Le juge doit dire au jury ce qui constitue le libelle; c'est au jury à décider si, d'après les circonstances, il y a libelle. (La Reine vs Dougall et al., C. B. R., justice criminelle, Montréal, 9, 10 et 11 avril 1874, RAMBAY, J., 18 J., 85; 7 R. L., 187; 23 R. J. R. Q., p. 472.)

Une action en libelle peut être intentée par une corporation contre une autre corporation. (L'Institut Canadien vs Le Nouveau-Monde, C. S., Montréal, 31 mai 1873, Johnson, J., 17 J., p. 296, et 23 R. J. R. Q., p. 247.)

LIBELLE :- Vide Corporation MUNICIPALE.

PREUVE.

LOCATAIRE :- Vide LOUAGE

LOUAGE. Aux termes de l'art. 1629 C. C., il y a présomption légale qu'un incendie ayant détruit totalité ou partie des bâtiments loués, a été causé par la faute du locataire, à moins que ce dernier ne prouve le contraire, et une action intentée par un locataire contre son bailleur et réclamant une déduction sur le loyer payé, depuis l'incendie à venir à la date de l'action, tant comme quantum meruit qu'à titre de dom-mages-intérêts, le locataire ayant fait réparer à ses frais les bâtiments partiellement incendiés, sera rejetée, s'il ne prouve que l'incendie n'a pas eu lieu par sa faute ou celle des personnes dont il est responsable. (Rapin vs McKinnon, C S. R., Montréal, 30 mars 1872, Mondelet, J., Mackay, J., et Beat-Dry, J., confirmant le jugement de C. C., Montréal, 30 juin 1871, Torrance, J., 17 J., p. 54, et 23 R. J. R. Q., p. 81.) DE MAISON. Le locataire d'une maison inhabitable et mal-

saine a le droit de l'abandonner et, par là même, de résilier le bail sans action et sans mettre en demeure son propriétaire, et cela quand même ce qui la rend inhabitable aurait pu être enlevé à peu de frais et en peu de temps. (Tylee vs Donegani, C. S. R., Montréal, 31 octobre 1871, Mondelet, J., dissident, Berthelot, J., et Torrance, J., 3 R. L.,

441; 2 R. C., 107; 23 R. J. R. Q., p. 517.)

M

MAITRE DE POSTE. Un maître de poste est responsable de la perte d'une lettre recommandée, lors que cette perte a eu lieu par sa faute ou celle de son fils mineur, employé par lui comme aide, ladite lettre, après avoir été entrée au registre des lettres recommandées, ayant été, contrairement aux règlements de la poste, déposée dans un endroit du bureau où le public pouvait avoir accès facilement. (Delaporte et al. vs Madden, C. S., Beauharnois, 18 mars 1872, Dunkin, J., 17 J., p. 29, et 23 R. J. R. Q., p. 34.)
DE POSTE:—Vide RESPONSABILITÉ.

DE VAISSEAU :- Vide CAPIAS.

MAITRES ET SERVITEURS. D'après la loi et la jurisprudence, le serviteur qui déserte le service de son maître avant l'expiration de son engagement, ne peut être reçu à réclamer le salaire qui pourrait lui être dû pour le temps qu'il a fait ; car le maître ne peut être tenu de payer le salaire de son employé qu'autant que ce dernier a, de son côié, rempli ses obliga-tions. (Cyr vs Cadieux, C. C., Montréal, 30 novembre 1872, Torrance, J., 17 J., p. 173. et 23 R. J. R. Q., p. 146.)

ET SERVITEURS :- Vide PREUVE.

MANDAT. Lorsque le mandant avoue qu'il a chargé la mandataire d'acheter pour lui des marchandises et que le chargement de ces dernières est établi par le connaissement du voiturier qui en a livré part e au mandant, il sera permis au vendeur de prouver, par le serment du mandataire, la quantité vendue et expédice. (Boyer et al. vs Beaupré, C. C., Sorel, 9 mai 1871, SICOTTE, J., 3 R. L., 34; 23 R. J. R. Q., p. 374.)

MARIAGE: - Vide CASSATION DE MARIAGE.

MEDECIN. Le paragraphe 7 de l'art, 2260 C. C., tel qu'amendé par le ch. 32, sec. 1, des Statuts de Québec de 1869, 32 Vict., se lit ainsi qu'il suit: "Pour les visites, soins, opérations et médicaments des médecins et chirurgiens, à compter de chaque service ou fourniture. Le médecin ou chirurgien en est cru nption légale des bâtiments moins que ce intentée par une déduction ir à la date titre de dom-à ses frais les e, s'il ne prouve celle des perinnon, C S. R., Y, J., et BEAUntréal, 30 juin Q., p. 81.) bitable et malnéme, de résimeure son prond inhabitable

peu de temps. obre 1871, Mon-

NCE, J., 3 R. L.,

ble de la perte rte a eu lieu par é par lui comme an registre des ment aux règledu bureau où le laporte et al. vs , DUNKIN, J., 17

orudence, le seravant l'expiraclamer le salaire 'il a fait ; car le de son employé mpli ses obliganovembre 1872, , p. 146.)

la mandataire le chargement ient du voiturier mis au vendeur la quantité ven-C., Sorel, 9 mai p. 374.)

'amendé par le), 32 Vict., se lit rations et médimpter de chaque irgien en est cru à son serment quant à la nature et à la durée des soins." Aux termes de ce paragraphe, la preuve de la réquisition des soins donnés par un médecin n'est pas nécessaire. La loi a réglé la question d'une manière péremptoire, en décrétant que le médechn a le droit de prouver la nature et la durce de ses services. Telle que conçue, la loi signifie que le médecin qui jure avoir donné des soins de telle ou telle nature, est dispensé de prouver qu'il a été requis de les donner, la preuve des soins donnés, de la nature et de la durée de ces soins, comportant évidemment celle de la réquisition; car, jusqu'à preuve du contraire, il y a présomption en faveur du médecin que, s'il a donné des soins, c'est qu'il en a été requis, ou qu'on a, au moins, permis ou souf-fert qu'il en donnat. (Barcelo vs Lebeau, C. C., Montréal, 10 mars 1873, Torrance, J., 17 J., p. 157, et 23 R. J. R. Q., D. 124.)

MOULIN: - Vide Cours D'EAU.

MINEUR. De ce principe, qu'un mineur ne peut être restitué que quand il a été lésé, il s'ensuit qu'il n'est pas restituable contre les obligations qu'il a faites pour son utilité et à son avantage; ainsi s'il s'est obligé pour chose qui ait été employée à la conservation de ses biens, quoiqu'il prouve sa minorité, il ne peut être restitué, mais il faut que la partie adverse prouve que in rem et utilitatem ejus versum est. (Miller vs Demeule, C. C., Murray Bay, 7 juin 1873, H. E. Taschereav, J., 18 J., 12; 23 R. J. R. Q., 298.)

En matière de prêt à un mineur, la loi présume que celui qui prête connaît l'état de la personne qui contracte avec lui; que le mineur est trop irréfléchi et a trop peu d'expérience pour employer utilement son argent; que celui qui prête à un mineur, contrairement au vœu de la loi, sans exiger que celui-ci soit assisté de son tuteur, encourage le vice, la débauche et la prodigalité, ou bien veut profiter de la faiblesse de son emprunteur pour exiger des intérêts usuraires et Pamener à sa ruine. Cependant la joi ne refuse pas entièrement tout recours au prêteur. Si le mineur a profité de l'emprunt, la règle d'équité naturelle qui veut que toute personne ne s'enrichisse aux dépens d'autrui prévant toujours et permet au prêteur de recouvrer, mais seulement pour autant que le mineur a profité de l'emprunt. C'est au prêteur à prouver l'emploi utile de l'argent. Le mineur n'a pas de preuve de lésion à faire: la loi le présume lésé (art. 1239 C. C.), même si le mineur a emprunté assisté de son tuteur, mais sans l'autorisation du conseil de famille ; car le tuteur lui même n'a pas le droit d'emprunter pour son pu-pille (ar'. 297 C. C.). Le mineur émancipé même n'a le droit d'empru...ter que s'il est commerçant, et alors seulement pour les fins de son commerce (art. 321). Et si le débiteur d'un mineur paie à ce mineur seul, malgré la faveur de la libération, c'est au débiteur à prouver que ce qu'il a payé a tourné au profit et à l'avantage du mineur (art. 1146). Si un mineur non autorisé vend un immeuble pour une certaine somme d'argent et qu'il reçoive cette somme, il pourra plus tard se faire remettre cet immeuble et aura l'immeuble et l'argent reçu comme prix de vente, à moins que celui qui a payé ne prouve que cet argent a tourné au profit du mineur, même si, au contrat de vente, ce mineur était assisté de son tuteur sans avis du conseil de famille, ni autorisation en justice (arts 1009 et 1011). Avant que l'art. 1010, qui est de droit nouveau, ne fût loi, même quand toutes les formalités voulues avaient été remplies, il y avait encore pour le mi-TOMB XXIII.

neur lieu à la restitution, mais alors il lui fallait prouver lésion, et dans ce cas il était restitué comme lésé et non comme mineur. Arts 290, 984, 985, 986, 1002 C. C. (Miller vs Demeule, C. C., Murray Bay, 7 juin 1873, H. E. TASCHEREAU, J., 18 J., 12; 23 R. J. R. Q., 298.)

MINEUR. Le mineur devenu majeur ne peut porter contre son tuteur ene action en recouvrement d'une somme d'argent qui, par un compte fait par le tuteur pendant la tutelle, apparaît être un reliquat de compte payable par le tuteur à une certaine date pendant son administration. Tant que le tuteur n'a pas rendu un compte final, la seule action qui compète au mineur devenu majeur est l'action tutelae directae ou en reddition de compte. (Bureau ys Moore, C. S., Montréal, 20 septembre 1872, Torrance, J., 17 J., p. 235, et 23 R. J. R. Q., p 202.)

Quand les actes contre lesquels le mineur demande d'être restitué ont été faits dans les formes, comme s'il s'est obligé étant assisté de son tuteur ou curateur; si ses immeubles ont été vendus par avis de ses parents homologué en justice, c'est à lui à justifier la lésion dont il se plaint, parce qu'en ce cas elle n'est pas présumée; mais s'il s'est obligé sans être assisté de tuteur ni de curateur; s'il a vendu, aliéné ou hypothéqué ses immeubles sans avis de parents ou autorité de justice, en ce cas c'est au créancier qui a prêté, ou à l'acquéreur qui a acheté de lui, à justifier que les deniers qui lui ont été baillés sont tournés à son profit. (Miller vs Demeule, C. C., Murray Bay, 7 juin 1873, H. E. TASCHEREAU, J., 18 J., 12; 23 R. J. R. Q., 298.)

Un père a le droit d'utiliser les services de son enfant mineur, de l'engager et de poursuivre pour ses gages. (Caron vs. Sylvain, C. S., Québec, 21 janvier 1871, TASCHEREAU, J., 2 R. L., 736; 1 R. C., 245; 23 R. J. R. Q., p. 363.)

Un père non tuteur de son fils mineur, ne peut poursuivre pour les gages de ce dernier, et une telle demande sera rejetée sur défense en droit. (*Carson vs Bishop*, C. S., Montréal, 30 novembre 1870, Mackay, J., 2 R. I., 624; 1 R. C., 121; 23 R. J. R. Q., 321.)

N

NEGLIGENCE. Lorsqu'une compagnie de gaz a placé des tuyaux dans une maison et qu'une fuite se produit à un point pour lequel la compagnie est responsable, la veuve de la personne tuée par l'explosion du gaz ne peut recouvrer des dommages de la compagnie, s'il appert que le défant a contribué à l'accident par sa négligence en allant, une lumière à la main, près de l'endroit où se dégageait le gaz. (Vallér vs New City Gas Co., C. S., Montréal, 30 décembre 1872, Johnson, J., 17 J., p. 63, et 23 R. J., R. Q., p. 95.)

NOUVEAU PROCES. La cour du Banc de la Reine, juridiction criminelle, présidée par un seul juge, est incompétente à accorder un nouveau procès. (La Reine vs Dougall et al., C. B. R., Juridiction Criminelle, Montréal, 28 reptembre 1874, RAMSAY,

J., 23 R. J. R. Q., p. 495.) NOVATION. Un billet n'opère novation de la dette pour laquelle il a été donné; c'est toujours la même dette et le même débiteur. (Richard vs Boisvert, C. C., Arthabaskaville, 16 mai 1871, Polette, J., 3 R. L., 7; 23 R. J. R. Q., p. 367.)

OPPO

NULLITE :- Vide Expropriation.

allait prouver e lésé et non . C. (Miller vs TASCHEREAU,

tre son tuteur rgent qui, par , apparait étre à une certaine ie le tuteur n'a lui compète au ectae ou en red-., Montréal, 20 t 23 R. J. R. Q.,

ande d'être res--'il s'est obligé i ses immeubles logué en justice, int, parce qu'en s'est obligé sans a vendu, aliéné e parents on aur qui a prêté, ou r que les deniers profit. (Miller vs. E. TASCHEREAU,

n enfant mineur, gages. (Caron vs SCHEREAU, J., 2 R. 3.) it poursuivre pour

ande sera rejetée 2. S., Montréal, 30 1 R. C., 121; 23

des tuyanx dans un point pour leve de la personne rer des dommages ant a contribué à umière à la main, Valler vs New City 2, Johnson, J., 17

juridiction crimilétente à accorder ll et al., C. B. R., abre 1874, RAMSAY,

pour laquelle il a et le même débiaskaville, 16 mai ., p. 367.)

OBLIGATION. Les allégations d'une déclaration, fondées sur contrats de vente passés devant notaires et par lesquelles on déclare que le défendeur est personnellement responsable envers le demandeur, ne peuvent être prouvées par une déclaration faite par le défendeur dans un autre contrat intervenu entre lui et un tiers; il n'existe dans ce cas aucun lien de droit entre le demandeur et le défendeur. (Pelletier vs Ratelle, C. S., Montréal, 28 février 1874. TORBANCE, J., 18 J., p. 75; 23

R. J. R. Q., 422.)

Le § 13 de la sec. 9 du ch. 17 des S. C. de 1864, 27-28 Vic., intitulé : " Acte concernant la faillite," est en ces termes: " Toute décharge ou composition, ou toute ratification d'une décharge ou composition, obtenue par fraude ou au moyen de préférences frauduleuses, ou au moyen du consentement d'un créancier, obtenu par le paiement à tel créancier d'une valeur quelconque, sera nulle et de nul effet." La sec. 28 du ch. 18 des S. C. de 1865, 29 Vic., intitulé: "Acte pour amender l'Acte concernant la Faillite 1864," se lit comme suit: "Si le créancier d'un failli prend ou reçoit directement ou indirectement du failli aucun paiement, don, gratification ou privilège, ou aucune promesse de paiement, don, gratification ou privilège, comme considération ou engagement pour le faire consentir à sa décharge ou pour lui faire exécuter un acte de composition et de décharge en sa faveur-tel créancier encourra une amende égale à trois fois la valeur du paiement, don, gratification ou privilège, ainsi pris, reçu ou primis—laquelle pourra être recouvrée par le syndic au bénéfice de la masse par action devant toute cour compétente, et après recouvrement sera distribuée comme formant partie de l'actif ordinaire des biens." Jugé sous ces dispositions que le billet d'un tiers, donné par un failli à un de ses créanciers pour le faire consentir à sa décharge, est nul et sans effet, et le créancier qui l'a ainsi reçu ne peut en recouvrer le montant. (Doyle et Prevost et al., C. B. R., en appel, Montréal, 19 septembre 1872, Callon, J., DRUMMOND, J., BAFGLEY, J., et MONK, J., infirmant le ju-gement de C. C., Montréal, 31 octobre 1871, 17 J., 307, et 23 R. J. R. Q., p. 276.)

-Vide MINEUR CONDITIONNELLE :- Vide VENTE.

SOLIDAIRE. Deux cultivateurs qui ont signé un billet ne sont pas obligés solidairement; la solidarité n'existe que dans le cas où les souscripteurs du billet sont commerçants. (Malhiot vs. Tessier, et Lemonde, C. S., Montréal, avril 1870, MACKAY, J., 2 R. L., 625; 14 R. L., 604; 1 R. C., 121; 23 R. J. R. Q., p. 322.)

SOLIDAIRE. Le débiteur originaire d'une obligation et le débiteur délégué qui, dans un acte de vente, s'est obligé de payer la dette et dont la délégation a été acceptée, ne peuvent être poursuivis tous les deux comme obligés solidairement, et une action demandant une condamnation solidaire sera rejetée sur défense en droit. (Arcand vs Blanchet, et Croteau, C. S., Québec, décembre 1870, TASCHEREAU, J., 2 R. L., 626; 1 R. C., 122; 23 R. J. R. Q., 323.)

SOLIDAIRE :- Vide CONCORDAT. OPPOSITION A FIN DE DISTRAIRE. Une partie, qui revendique des immeubles saisis, ne peut le faire au moyen d'une intervention, pendant qu'une opposition à fin de distraire, for-

mée par une autre partie, est encore pendante ; et une intervention, faite en de telles circonstances, sur l'ordre provisionnel d'un juge, sera rejetée sur motion. (Bethune vs Chapleau et al., et Fraser, opp., et Thomas, intervenant, C.S., R., Montréal, 28 juin 1872, Berthelor, J., Mackay, J., et Beaudry, J., confirmant le jagement de C. S., Montréal, 30 mars 1872, Torrace, J., 17 J., p. 33, et 23 R. J. R. Q., p. 40.) OPPOSITION A JUGEMENT. L'opposition à jugement, formée par des défendeurs en vertu de l'art. 484 C. P. C. et basée sur le seul motif que l'un d'entre eux a été assigné sous un faux prénom, est une procédure de la nature d'une exception préli-

minaire et doit, en consequence, être accompagnée du dépôt exigé par l'art. 112 C. l'. C. en sus de celui requis par l'art. 486 du même code. (Jubinville et al. et Bank of British North America, C. B. R., en appel, Montréal, 20 juin 1874, Taschereau, J., Ramsay, J., Sanborn, J., et Loranger, J. A., confirmant le jugement de C. S., Montréal, 22 avril 1873, MACKAY, J., 17 J., p. 162; 18 J., p. 237, et 23 R. J. R. Q.,

PEAGE: - Vide Action Possessoire.

PENSION ALIMENTAIRE: - Vide Action en séparation de corps.

PERE: - Vide Mineur. PEREMPTION D'INSTANCE :- Vide Contrainte par corps.

PONT: - Vide Action possessoire.

CORPORATION MUNICIPALE.

POSSESSION: - Vide Action Possessoire.

PRESCRIPTION. La prescription d'un billet à ordre fait et payable en un pays étranger, est réglée par la loi du domicile du débiteur, lex fori, et non par la loi du lieu où le contrat a été passé, lex loci contractus. Arts. 2260 et 2267 C C. (Hillsburgh vs Mayer, C. S., Montréal, 30 septembre 1873, MACKAY, J. 18 J., p. 69; 23 R. J. R. Q., p. 355.) -Vide Bornage.

CENS ET RENTES.

44 CRAINTE DE TROUBLE.

VENTE DE DROITS SUCCESSIES.

PRESIDENT D'UNE CORPORATION:-Vide Compétence.

PRET: - Vide MINEUR.

PRETEUR SUR GAGE. Le ch. 2 des Statuts de Québec de 1870. 34 Vict., intitulé: "Acte pour refondre et amender la lo relative aux licences, et aux droits et obligations des personnes tenues d'en être munies," décrétait, sec. 69: "Nulle personne ne fera le commerce de prêter sur gage dans cette province, sans être munie d'une licence, et tout prêteur sur gage contrevenant à cette section encourra une amende de deux cents piastres pour chaque gage qu'il prendra san licence." Sec. 70: "Toutes les personnes qui recevront el gage ou en échange d'une personne des effets pour l remboursement de l'argent prêté sur ces effets, si ce n'es dans le cours ordinaire des affaires de banque on de transactions commerciales, entre marc ands ou négo ciants, seront censées être des prêteurs sur gage suivant l sens et l'intention du présent acte." Jugé que les dispe sitions de ces deux sections ne s'appliquent qu'aux per sonnes faisant le commerce de prêteurs sur gage, et non un particulier qui prête de l'argent à son ami et qui, en faisant, prend, comme sûreté, une montre et un autre obje en gage, ce que le statut ci-dessus n'a jamais entend

ante; et une innces, sur l'ordre tion. (Bethune vs intervenant, C.S., J., MACKAY, J., et C. S., Montréal, 30 R. J. R. Q., p. 40.) nt, formée par des basée sur le seul ous un faux prée exception préliaccompagnée du le celui requis par et Bank of British réal, 20 juin 1874, et Loranger, J. A., réal, 22 avril 1873, , et 23 R. J. R. Q.,

ATION DE CORPS.

AR CORPS.

re fait et payable en lu domicile du débioù le contrat a été 267 C.C. (Hillsburgh 1873, MACKAY, J.,

ÉTENCE.

de Québec de 1870, e et amender la loi obligations des pertait, sec. 69: "Nulle r sur gage dans cette e, et tout prêteur sur purra une amende de e qu'il prendra sans nes qui recevront en des effets pour ces effets, si ce n'es de banque on de arc ands ou négo s sur gage suivant | Jugé que les dispo diquent qu'aux per rs sur gage, et non son ami et qui, en ntre et un autre obje n'a jamais entend prohiber. (*Laviolette* vs. *Duverger*, C. S., Montréal, 29 décembre 1871, Маскау, J., 3 R. L., pp. 444, 521; 6 R. L., p. 723; 2 R. C., p. 109; 23 R. J. R. Q., p. 525.)

PRETRE: - Vide COMMUNICATIONS CONFIDENTIELLES.

PREUVE. Dans une action en séparation de corps et de biens pour adultère commis par le mari dans la maison même où il demeurait avec son épouse, la cour tiendra compte des aveux faits par le mari à des tiers ou résultant de son défaut de répondre aux interrogatoires sur faits et articles, lorsqu'elle est d'opinion que ces aveux ne sont pas le résultat d'une collusion entre la demanderesse et le défendeur. (Starke vs. Massey, C. S., Montréal, 31 janvier 1873, Johnson, J., 17 J., p. 742, et 22 R. J. R. Q., p. 84.)

Dans une action pour salaire, par un domestique, à laquelle le maître plaide spécialement engagement verbal, pour une année, à un prix déterminé, et que son domestique a abandonné son service sons raison valable, la cour peut, en l'absence de preuve écrite, accepter, comme preuve de circonstance, la déclaration faite sous serment par le maître. Art. 1669 C. C. (Cyr vs Cadieux, C. C., Montréal, 30 novembre 1872, Torbance, J., 17 J., p. 173; 4 R. L., p. 681, et 23 R.

J. R. Q., p. 146.)

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D'après la loi anglaise qui a été introduite dans le Bas-Canada lors de la cession du Canada en 1763 et qui n'a pas été changée depuis, soit par des statuts impériaux, soit par des statuts canadiens, la déposition sous serment d'un témoin, lorsqu'elle a été faite légalement, peut être admise comme preuve contre ce témoin si, subséquemment, il est mis en jugement pour délit. Il n'y a d'exception à cette règle que pour les réponses aux questions auxquelles, pendant l'interrogatoire, il s'est objecté parce qu'elles tendaient à l'incri-miner, et auxquelles le tribunal lui a à tort ordonné de répondre. Ainsi la déposition d'un témoin concernant l'origine d'un incendie, faite sous serment devant les commissaires des incendies en vertu des Statuts de Québec de 1868, 31 Vict., ch. 32, et de 1869, 32 Vict., ch. 29, et avant qu'aucune accusation ne fut portée contre ce témoin, peut être admise comme preuve contre lui s'il est subséquemment mis en jugement sur accusation d'avoir été l'auteur de l'incendie. (La Reine vs. Coote, Conseil Privé, Londres, 18 mars 1873, infirmant le jugement de C. B. R., Montréal, 15 mars 1872, Duval, J. en C., Caron, J., Drummond, J., Badgley, J., dissident, et Monk, J., dissident, 18 J., p. 103; 2 R. C., p. 231; 4 L. R., A. C., p. 599; 9 M. P. C. R., N. S., p. 463; 23 R. J. R. Q., p. 502.)

Il n'est pas besoin d'une inscription en faux pour faire admettre la preuve que des deniers, dont le reçu est constaté dans un acte de vente, n'ont jamais été payés. (Doyon vs. Doyon, C. S. R., Québec 30 décembre 1871, MEREDITH, J. en C., STUART, J., et TASCHEREAU, J., 3 R. L., p. 445; 14 R. L., p. 138; 2 R.C., p. 110; 23 R. J. R. Q., p. 526.)

L'affidavit, produit au greffe pour obtenir jugement dans les causes par défaut ou ex parte, équivaut à la déposition d'un témoin en cour; il tient également lieu d'enquête ou de prenve. (Damour et al. vs Bourdon, C. C., en Chambre, Montréal, 22 janvier 1873, MACKAY, J., 17 J., p. 85, et 23 R. J. R. Q., p. 109.)

La preuve de faits postérieurs au libelle et tendant à prouver l'absence de malice peut être faite ainsi que la reuve de pourparlers en vue d'en arriver à un arrangement ; mais la preuve de rumeurs tendant à établir la vérité du libelle est inadmissible. (La Reine ys Dougall et al., C. B. R., justice criminelle, Montréal, 9, 10 et 11 avril 1874, Ramsay, J., 18 J., p. 85; 7 R. L., p. 187; 23 R. J. R. Q., p. 472.)

PREUVE :--Vide Assurance contre l'incendie.

- BILLET PROMISSOIRE.
 - CASSATION DE MARIAGE.
 - COMMUNICATIONS CONFIDENTIELLES.
 - FAUX.
 - LIBELLE.
 - .. MANDAT.
 - 68 44 MÉDECIN.
 - MINEUR.
 - 66
 - TÉMOIN. 66

TESTIMONIALE. La preuve par témoins d'une vente, qui a eu lieu sans contrat par écrit et sans livraison, est inadmissible. (Berrd vs McLaren, C. S., Montréal, 31 octobre 1873, Torrance, J., 18 J., p. 76; 23 R. J. R. Q., p. 462.) Lecontenu d'une lettre, alléguée avoir été écrite pur le défen-

66 deur dans une cause en séparation de corps et de biens et qu'on jure avoir été détruite, peut être établi par la preuve

testimoniale. (Starke vs Massey, C. S., Montréal, 30 décembr. 1871, TORRANCE, J., 17 J., p. 56, et 23 R. J. R. Q., p. 84.) TESTIMONIALE. La sec. 9 du ch. 6 des S. Q. de 1871, 35 Vict., a amendé l'art. 252 C. P. C., en y ajoutant le paragraphe suivant: "Cependant, si les époux sont séparés de biens, et que l'un d'eux, comme agent, a administré les propriétés de l'autre, l'épouxqui a ainsi administré pourra être examiné comme témoin sur tout fait qui concerne telle administration; pourvu que la cour ou le juge, eu égard aux circonstances de la cause, soit d'avis qu'il est juste et à propos d'ordonner tel examen; chaque fois que tel examen sera permis, il sera fait sans restriction, comme l'aurait été celui de l'autre époux, soit pour ce qui regarde l'admissi-bilité d'une preuve verbale, soit autrement." Il a été jugé qu'une demande faite par une femme séparée de biens, dens une cause où elle est défenderesse, pour qu'il lui fût permis, en vertu du dit statut, d'interroger son mari, administrateur de ses propriétés à elle, touchant certains actes de son administration, doit être rejetée par le motif que le paragraphe ci-dessus cité ne confère qu'à la partie adverse le droit d'interroger l'époux qui a administré. (Brush vs. Stephens et vir, et Stephens et vir, req., C.S., Montréal, 18 jan-

vier 1873, Johnson, J., 17 J., p. 140, et 23 R. J. R. Q., p. 114.) TESTIMONIALE. Le défendeur, qui a été par jugement condamné à payer une somme déterminée et qui prouve par témoins avoir payé et avoir eu quittance par écrit du demandeur, peut être admis à affirmer sous serment la perte de cet écrit et les circonstances de cette perte. (Guevremont vs Girouard, et Langevin, t. s., C. C., Sorel, 9 mai 1871, Sicotte, J., 3 R. L., p. 37; 23 R. J. R. Q., p. 376.)

PRIVILEGE: - Vide ACTION POSSESSOIRE. DE L'OUVRIER. Le carrossier, qui a fait des réparations à une voiture dont le propriétaire est depuis devenu insolvable, a droit, le syndic ayant saisi-revendiqué cette voiture, de la garder en sa possession, comme gage de la valeur des réparations faites, si le syndic ne les paie ou ne fournit cautionnement qu'elles seront payées. (Stewart vs

Ledoux, C. S., Montréal, 30 septembre 1872, Маскат, J., 17 J., p. 167; 2 R. C., p. 482, et 23 R. J. R. Q., p. 141.) DU VENDEUR. Le vendeur non payé et qui n'a pas enregistré son titre a le droit de se pourvoir en justice, pour C. B. R., justice AMSAY, J., 18 J.,

ine vente, qui a on, est inadmis-31 octobre 1873, 462.)

rite pur le défenps et de biens et bli par la preuve ntréal, 30 décemde 1871, 35 Vict., nt le paragraphe séparés de biens, stré les propriétés pourra être exa-ni concerne telle le juge, eu égard qu'il est juste et à ois que tel examen comme l'aurait été regarde l'admissint." Il a été jugé séparée de biens, , pour qu'il lui fût er son mari, adminant certains actes par le motif que le l la partie adverse inistré. (Brush vs Montréal, 18 jan-R. J. R. Q., p. 114.) par jugement conet qui prouve par ance par écrit du er sous serment la es de cette perte. t. s., C. C., Sorel, R. J. R. Q., p. 376.)

t des réparations à puis devenu insol-si-revendiqué cette comme gage de la lic ne les paie ou ne payées. (Stewart vs 1872, MACKAY, J., R. Q., p. 141.) t qui n'a pas enreoir en justice, pour

faire résilier la vente, même après que l'immeuble a été transféré à un tiers détenteur ou qu'il a été hypothéqué à des créanciers subséquents dont les titres ont été enregistrés, par les motifs que le vendeur a conservé un droit de propriété dans l'immeuble, à défaut par l'acheteur de payer le prix de vente, et non pas un simple droit ou privilège de bailleur de fonds, et qu'il n'est censé avoir consenti à la vente que sons la condition résolutoire en cas de non paiement. (Gauthier et Valois, C. B. R., en appel, Montréal, 23 juin 1873, Duval, J. en C., Drummond, J., Badgley, J., Monk, J., et Taschereau, J., 18 J., p. 26; 23 R. J. R. Q.,

p. 316.) PRIVILEGE DU VENDEUR. Le vendeur non payé qui, à raison du non paiement du prix d'un immeuble, a intenté une action résolutoire avant le décret de cet immeable, bien que jugement sur l'action résolutoire n'ait été rendu en sa faveur que plusieurs mois après le décret, a droit d'être payé de préférence même à un créancier hypothécaire dont l'hypothèque aurait été enregistrée longtemps avant l'enregistrement du contrat de vente par le vendeur. (Gauthier et Valois, C. B. R., en appel, Montréal, 23 juin 1873, Duvat, J. en C., Drummond, J., Baddley, J., Monk, J., et Taschereau, J., confirmant le jugement de C. S., Montréal, 28 février 1871, Braudry, J., 18 J., p. 26; 23 R. J. R. Q., p. 316.)

DU VENDEUR. Le vendeur non payé, qui n'a pas vendu sans jour et sans terme, n'a que l'action en résolution, et non l'action en revendication comme en droit romain, encore qu'il se soit réservé son droit de propriété jusqu'à parfait paiement et le droit de reprendre sa chose, en cas de non paiement, même sans procédures judiciaires. (Brown et Lemieux, C. B. R., en appel, Montréal, 6 septembre 1872, Duval, J. en C., dissident, Caron, J., Drummond, J., Baddley, J., et Monk, J., dissident, infirmant le jugement de C. S., Montréal, 30 novembre 1869, Berthelor, J., 3 R. L.,

p. 361; 1 R. C, p. 476; 23 R. J. R. Q, p. 403.) PROCEDURE. Bien qu'il soit permis au demandeur de produire une demande incidente supplétoire dans les cas prévus par les articles 18 et 149 C. P. C., il ne lui est pas permis, par la loi, de faire une demande supplétoire ou additionnelle fondée sur des faits nouveaux qui n'existaient pas lors de l'introduction de son action. (Gadbois et Trudeau et al., C.B.R., en appel, Montréal, 20 décembre 1872, Duval, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et MONK, J., infirmant le jugement de C.S., Montréal, 30 octobre 1869, TORRANGE, J.,

17 J., p. 271; 3 R. C., p. 52, et 23 R. J. R. Q., p. 226.) Dans le cas où une partie a donné avis de son intention d'appeler d'un jugement rendu en vertu de l'acte d'agriculture et a fourni caution, mais n'a pas fa t signifier de bref d'appet dans les délais requis par la loi, il est permis à l'intimé de faire motion pour que l'appelant soit déclaré déchu de son droit d'appel. (Pél quin vs. Lamothe, C. C., Sorel, 17 mai 1871, Sicotte, J., 3 R. L., p. 58; 23 R. J. R. Q., p. 385.) Le code n'a pas changé la loi antérieure à sa passation rela-

tivement aux détails dans les causes de la Cour Supérieure, et n'exige pas qu'ils soient annexés ou mentionnés au long dans la déclaration. (Banque Nationale vs Banque de la Cité, C. S. R., Québec, 4 février 1871, STUART, J., TASOHE-REAU, J., et CASAULT, J., 3 R. L., p. 28; 1 R. C., p. 247; 23 R. J. R. Q., p. 370.)

Le commandant d'un régiment, qui est poursuivi en dommages par un caporal en retraite, pour avoir, illégalement, malicieusement et sans cause probable, fait arrêter et emprisonner ce caporal alors qu'il faisait partie du régiment, n'a pas droit à l'avis d'un mois décrété par l'article 22 C. P. C. (Barnes vs Mostyn, C. S., Montréal, 17 décembre 1872, MACKAY, J., 17 J., p. 288; 4 R. L., p. 542; 2 R. C., p. 482, et 23 R. J. R. Q., p. 237.)

PROCEDURE. Les faillis qui, par malentendu de leurs avocats et de ceux des parties contestantes, ont été empêchés de donner de fortes preuves qu'ils avaient droit à la confirmation de leur décharge qu'ils demandaient, et contre lesquels jugement a été rendu en conséquence, peuvent obtenir le redressement du tort qui leur a été causé en cette occurence par une requête civile alléguant les raisons de leur première demande et la réfutation qu'ils auraient pu faire alors des prétentions des parties contestantes, s'ils n'avaient pas été pris par surprise et trompés. (Lusk et al., faillis, req. décharge, et Riddell, syndic, et Ross, créancier, contestants, C. S.. Montréal, 30 novembre 1874, Johnson, J., 19 J., p. 104, et 23 R. J. R. Q., p. 73.)

et 23 R. J. R. Q., p. 73.) Le syndie à une faillite, pour-uivi par une demande en saisierevendication, est bien fondé à reponsser cette action par une défense au fond en droit, aucune demande en saisierevendication ne pouvant être portée contre le syndic en verto du ch. 16 des S. C. de 1869, 32-33 Vict., intitulé: "Acte concernant la Faillite," qui décrétait, sec. 50, que: "Tout syndic provisoire, gardien et syndic, sera assujetti à la juridiction sommaire de la cour ou du juge, de la même manière et au même degré que les officiers ordinaires de la cour sont sujets à sa juridiction; et il pourra même être contraint de remplir ses devoirs respectifs; et tous les recours dans le but de recouvrer une créance, un privilège, une hypothèque, ou un droit de propriété sur des effets ou propriétés entre les mains, ou en la possession ou sous la garde du syndic, pourront être exercés sur un ordre du juge à la suite d'une requête sommaire en vacance, ou d'une ordonnance de la cour pendant le terme, et non par poursuite, saisie, opposition, saisie-arrêt ou autre procédure d'aucune nature quelconque." (Larocque vs Lajoie, C. S.,

p. 477, et 23 R. J. R. Q., p. 64.)
L'exception déclinatoire, formée par le défendeur à une action en recouvrement d'un billet daté de Montréal, mais en réalité fait et signé dans un autre district, est valide lors même qu'elle ne serait pas accompagnée de l'affidavit mentionné par l'art. 145 C. P. C. (Hudon vs Champagne, C. S., Montréal, 29 février 1872, MACKAY, J., 17 J., p. 45; 2 R. C., p. 233, et 23 R. J. R. Q., p. 68.)

Montréal, 28 juin 1872, MACKAY, J., 17 J., p. 41, 2 R. C.,

L'option d'une partie que la cause soit inscrite en même temps pour enquête et audition finale au mérite immédiatement après l'enquête est, aux termes de l'art. 243 C. P. C., suffisamment parfaite par la signification à la partie adverse de l'inscription de la cause sur le rôle de droit pour enquête et audition au mérite en même temps. (Simpson et al. vs Bowie et al., C. S., Montrésl, 31 octobre 1872, TORRANCE, J., 17 J., 28, et 23 R. J. R. Q., 34.)

Lorsque, sur demande en partage d'une succession, les parties out été renvoyées devant des praticions et experts pour en opérer la liquidation, et que l'une d'entre elles s'est plainte qu'un document produit par la partie adverse devant ces praticiens et experts dont la majorité l'a accepté, est faux elle a le droit de le contester devant la cour, par requéte som-

fait arrêter et partie du régi-été par l'article tréal, 17 décem-, p. 542; 2 R. C.,

urs avocats et de êchés de donner confirmation de tre lesquels jugent obtenir le ren cette occurence de leur première ou faire alors des n'avaient pas été al., faillis, req. déncier, contestants, N. J., 19 J., p. 104,

mande en saisier cette action par emande en saisieontre le syndic en 33 Vict., intitulé: stait, sec. 50, que: lic, sera assujetti i u juge, de la même ers ordinaires de la pourra même être ectifs; et tous les éance, un privilège, té sur des effets ou ssession ou sous la ur un ordre du juge vacance, ou d'une e, et non par pourou autre procedure que vs Lajoie, C. S., 17 J., p. 41, 2 R. C.,

e défendeur à une é de Montréal, mais e district, est valide agnée de l'affidavit on vs Champagne, C. J., 17 J., p. 45; 2 R.

, inscrite en même au mérite immédiade l'art. 243 C. P. C. tion à la partie adle rôle de droit pour e temps. (Simpson et tobre 1872, Torrance,

necession, les parties ns et experts pour en re elles s'est plainte adverse devant ces 'a accepté, est faux our, par requête som maire, ainsi que le rapport des praticiens et experts, en tant qu'il concerne le dit document. (Brunet dit Létang et al. vs Brunet dit Lêtang, C. S., Montréal, 30 décembre 1871, BEAUDRY, J., 17 J., p. 51, et 23 R. J. R. Q., p. 77)

PROCEDURE. Lorsqu'un a socié déclare, dans un arrêté de compte de la société, devoir à son coassocié une somme déterminée

qu'il refuse ensuite de payer, l'action à intenter dans ce cas pour le recouvrement de ladite somme est l'action pro socio, et non l'assumpsit qui n'existe pas dans notre système de procédure. (Marcoux vs. Morris, C. S. R., Montréal, 31 octobre 1871, Mondelet, J., Berthelot, J., et Mackay, J., dissident, 3 R. L., p. 441; 2 R. C., p. 107; 23 R. J. R. Q.,

Lorsqu'une partie a par suite d'un malentendu de son pro-cureur et de celui de la partie adverse, été empêchée de faire une preuve importante, elle peut, par requête civile, faire annuler le jugement rendu contre elle, quoiqu'elle ait, lors de l'audition de la cause qui était inscrite pour enquête et mérite, demandé la permission de faire cette preuve et allégué ce malentendu sans avoir toutefois l'occasion de le prouver. L'appel ou la revision ne sont d'aucune utilité pour corriger ce qui n'apparaît pas au dossier. (Lush et al., faillis, et Riddell, syndic, et Ross, cont., C. S., Montréal, 30 novembre 1874, Johnson, J., 19 J., p. 104; 23 R. J. R. Q.,

Nonobstant le consentement des parties à ce que le jugement dont est appel soit infirmé, la cour doit le confirmer si l'examen du dossier démontre que ce jugement est bien fondé. (McAndrews et Rowan, C. B. R., en appel, Montréal, 12 décembre 1871, DUYAL, J. en C., CARON, J., DRUMMOND, J., BADGLEY, J., et Monk, J., 3 R. L., p. 439; 2 R. C., p. 106; 23 R. J. R. Q., p. 515.)

Plusieurs défendeurs qui ont comparu séparément mais par le même procureur, peuvent joindre leurs défenses et n'en produire qu'une. (Arsenault vs Rousseau et al., Montmagny, 13 février 1871, Bossé, J., 3 R. L., 28; 1 R. C., 247; 23 R. J.

R. Q., 369.)

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Un dépôt est nécessaire avec les plaidoyers préliminaires dans les causes de la Cour de Circuit intentées pour un montant moindre que \$60, et copies des plaidoyers doivent être signifiées au procureur du demandeur. (Lusher vs Parsons, C. C., Montréal, 9 mai 1873, Beaudry, J., 17 J., p. 196, et 23 R. J. R. Q., p. 160.)

Une action de la Cour de Circuit, par laquelle le demandeur réclame \$9.33 d'arrérages de cens et rentes et rente constituée, n'est pas une cause appelable. (DeBell-feuille et al. vs. Mackay, C. C., 14 février 1871, Berth-Lot, J., 3 R. L., 33; 7 R. L., 428; 23 R. J. R. Q., 373.)
Une motion, faite par le demandeur pendant son enquête et

par laquelle il demande permission d'amender la déclaration, est prématurée; il semble qu'une telle motion ne doive être faite qu'à l'audition finale au mérite. Art. 20 C. P. C. de 1867. Art. 520 C. P. C. de 1897. (Beard vs McLaren, C. S., Montréal, 31 mars 1874, Torrance, J., 18 J., 78; 23 R. J. R. Q., p. 464.) :-Vide Action en Garantie.

APPEL.

46 66 Assignation.

46 AUTORISATION MARITALE.

48 CAPIAS.

64 CHAS ET RENTES. PROCEDURE :- Vide CONCORDAT.

:- Vide CONTRAINTE PAR CORPS.

" :- " CURATEUR A INTERDIT POUR IVROGNERIE.

:- " EXCEPTION A LA FORME.

" :- " INSCRIPTION.

" :- " INSCRIPTION EN FAUX.

:- " INSCRIPTION EN REVISION.

" :- " JURIDICTION.

" :- " PROCES PAR JURY.

" :- " REVISION.

SIGNIFICATION.

" :- " TIERCE OPPOSITION.

" :- " TIERS SAISI.
" VENTE DES CRÉANCES D'UN FAILLI.

CRIMINELLE. Une demande pour différer le procès vu l'absence de témoins importants, doit être appuyée par un affidavit spécial démontrant que les témoins absents sont réellement des témoins importants. La défense n'est pas obligée de dévoiler ce sur quoi les témoins absents auront à donner témoignage, mais elle doit montrer que ces témoins pourraient prouver des faits dont la preuve peut être faite devant le jury. (La Reine vs Dougall et al., C. B. R., justice criminelle, 9-11 avril 1874, RAMSAY, J., 18 J., 85; 7 R. L., 187; 23 R. J. R. Q., p. 472.)
CRIMINELLE. Le ch. 99 des S. R. C. de 1859, initiulé: "Acte

concernant la procédure en matière criminelle," décrétait, sec. 46: " Toute objection à un indictement pour défaut de forme apparent à la face d'icelui, sera faite par une exception ou motion pour mettre à néant cet in lictemer, avant que le jury soit assermenté, et non après; et la cov. devant laquelle une telle objection est présentée, pourra, si elle le juge nécessaire, ordonner que l'indictement soit amendé immédiatement sur ce point par un officier de la cour ou autre personne, et eusuite, le procès continuera comme si l'informalité n'eût jamais existé." Jugé que l'insuffisance des allégations ou les défauts de forme de l'acte d'accusation doivent être attaqués par une défense en droit ou une motion pour casser l'acte d'accusation, avant l'audition de la preuve; qu'une fois la preuve entendue, il faut attendre le verdict et, s'il est contraire à l'accusé, empêcher la condamnation par une motion d'arrêt de jugement; que toute pratique contraire est vicieuse et ne doit pas être suivie; que tout ce qui est nécessaire pour constituer une offense doit être allégué Jans l'acte d'accusation, autrement il est nul. Semble que le défaut d'alléguer, dans un acte d'accusation contre des distillateurs, que le robinet ouvert par les accusés, dans leur distillerie, avait été placé par le gouvernement pour la sûreté du revenu dudit gouvernement, est fatal

à l'acte d'accusation. (La Reine vs Bourdon et al., C. B. R., justice criminelle, Montréal, 4 octobre 1867, BADGLEY, J., 2

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R. L., 713; 23 R. J. R. Q., 325.)

PROCES PAR JURY. La signification dans les quatre jours qui suivent la contestation liée, d'un avis de la motion par laquelle le demandeur entend demander acte de son option pour un procès par jury, et la production subséquente de cette motion sont des procédures en conformité de l'art. 350 C. P. C. (Brown et Imperial Fire Insurance Co, C. B. R., en appel, Montréal, 14 décembre 1874, Dorion, J. en C., Monk, J., Ramsay, J., Sanborn, J., infirmant le jugement de C. S., Montréal, 18 septembre 1874, Berthelot, J., 20 J., 179; 23

R. J. R. Q., 284.)

PROCES PAR JURY. Les notes prises par le juge au cours du procès ne forment pas partie du dossier. (Dougall et al. et la Reine, C. B. R., Montréal, 16 septembre 1876, Dorion, J. en C., Monk, J., Samorn, J., Tessier, J., et Bélanger, J. ad hoc, 22 J., 133; 23 R. J. R. Q., 492.)

PAR JURY. Lorsqu'il n'en résulte aucun préjudice, le refus du droit de répliquer à la plaidoirie devant les jurés n'est

pas une raison suffisante pour obtenir un nouveau procès. (Philippstall vs Duval, C. S. R., Québec, 5 octobre 1871, Meredith, J. en C., Stuart, J., et Taschereau, J., dissident, 3 R. L., 455; 1 R. C., 480; 23 R. J. R. Q., 371.)

PAR JURY. Si, après la formation d'un tableau de jurés pour

servir dans une cause civile et avant la formation du rôle, un nouveau jury est formé pour une autre cause, cela n'empèchera pas le rôle d'être composé de jurés formant partie du premier tableau. (Arts 437, 438, 439 С.Р.С. de 1897. (Phi-lippstall vs Duval, C. S. R., Québec, 4 février 1871, МЕВ. DITH, J. en C., Taschereau, J., et Stuart, J. dissident, infirmant le jugement de C. S., Stuart, J., 3 R. L., 291; 1 R. C., 247;

23 R. J. R.Q., p. 370.)

"VERBAL:—Vide Chemin.
PROCUREUR AD LITEM. Lorsque le procureur de l'une des parties dans une car se a accepté la charge de magistrat stipendiaire, aucune procedure ne peut plus avoir lieu dans cette cause tant que la partie pour laquelle il agissait n'a pas été sommée de nommer un autre procureur et ait fait défaut d'en nommer un. (Maillet vs Séré, C. C., Montréal, 6 mars 1873, TORRANCE, J., 17 J., p. 139, et 23 R. J. R. Q., p. 114.)

AD LITEM. Une cause peut être inscrite en revision par un

avocat autre que celui qui a comparu en première instance, et sans substitution. (Desrosiers vs McDonald, C. S. R., Québec, 6 novembre 1871, Meredith, J. en C., Stuart, J., Tascherrau, J., 3 R. L., p. 445; 2 R. C., p. 110; 23 R. J.

R. Q, p. 526.)

PROHIBITION. Un bref de prohibition peut être émis pour empêcher l'exécution d'une condamnation portée par des de paix en vertu de la sec. 22 du ch. 6 des S. R. B. C. de 1861 et condamnant le défendeur à payer une amende pour avoir vendu sans licence des liqueurs enivrantes (Duval et Hebert et al., C. B. R., en appel, Québec, 18 juin 1870, CARON, J., dissident, DRUMMOND, J., BADGLEY, J., MONK, J., et LO-RANGER, J. ad hoc, dissident, infirmant le jugement de C. S., district d'Arthabaska, 13 février 1869, POLETTE, J., 17 J., p. 229, et 23 R. J. R. Q., p. 196.) :- Vide Action Possessoire.

PROPRIETE: - Vide Action Possessoire. :- " JUGEMENT INTERLOCUTOIRE.
" JURIDICTION PROTONOTAIRE :- Vide Compétence.

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RATIFICATION DE VENTE :- Vide VENTE.

RECORDER. La loi n'obligeant pas le recorder à prendre des notes des témoignages, la Cour Supérieure n'a aucun moyen de décider une question de juridiction qui dépend des faits prouvés devant lui. (Ex parte Cayen, req. certiorari, et Le maire et al., plaignants, et Sexton, recorder, C. S., Montréal, novembre 1870, TORRANDE, J., 17 J., p. 74, et 23 R. J. R. Q., p. 100.)

le procès vu l'abappuyée par un ns absents sont défense n'est pas absents auront ontrer que ces tépreuve peut être ll et al., C. B. R., Y, J., 18 J., 85; 7

, intitulé : " Acte inelle," décrétait, nt pour défaut de te par une exceplictemer, avant et la cov. devant pourra, si elle le nent soit amendé cier de la cour ou tinuera comme si que l'insuffisance le l'acte d'accusase en droit ou une vant l'audition de e, il faut attendre empêcher la conement; que toute t pas être suivie; tituer une offense autrement il est is un acie d'accuiet ouvert par les cé par le gouverrnement, est fatal n et al., C. B. R., 37, BADGLEY, J., 2

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jours qui suivent on par laquelle le on option pour équente de cette ité de l'art. 350 Co , C. B. R., en , J. on C., Monk, igement de C. S., J., 20 J., 179; 23 RECTIFICATION D'ACTE DE L'ETAT CIVIL:—Vide Registres de l'état civil.

RECUSATION. Le ch. 16 des S. C. de 1869, 32-33 Vict., intitulé: "Acte concernant la Faillite," décrétait, sec. 137, que"....si le syndic d'une faillite a une réclamation contre le failli, comme créancier, ou s'il est colloqué pour quelques frais ou rémuné-ration, ou s'il est l'agent, le procureur on le représentant d'un réclamant contre le failli, il ne pourra ni entendre, ni juger, ni décider aucune contestation relative à sa propre réclamation ou collocation ou à la réclamation de la personne qu'il représente, ou à quelque dividende, ni aucune contestation ou question soulevée par lui ou par la personne qu'il représente..." Le ch. 25 des S. C. de 1871, 34 Vict., intitulé: " Acte pour amender l'acte de Faillite 1869," décrétait, sec. 9, que 'le juge ou le syndic, selon le cas, sera incompétent s'il est parent ou allié par mariage jusqu'au degré de cousin germain inclusivement, à l'une des parties comparaissant devant lui, de la même manière que pour les autres causes énumérées dans la cent trente-septième section dudit acte; et il sera procédé, dans le cas de telle incompétence, et le sujet en litige sera décidé de la manière prescrite par ladite section." Ces deux sections indiquent les cas où le syndic est inhabile à agir, elles ne parlent pas de récusation. Aucune loi ne décrète positivement que le syndic à une faillite, eo nomine, puisse être récusé, mais on doit inférer des termes de l'art. 176 C. P. C., qui dit que "tout juge peut être récusé," qu'une telle récusation est permise, cette expression "tout juge" désignant tous ceux qui exercent les fonctions judiciaires, même dans les limites les plus restreintes, et le syndic à une faillite, dans les limites de ses attributions, remplissant l'office d'un juge. Aux termes de cet article, le juge ou la Cour peut, sur requête de la part d'un réclamant, alléguant des faits qu'il prétend être des moyens légaux de récusation du syndic et demandant qu'il lui soit permis de récuser ce dernier, enjoindre au syndic de suspendre la procédure et ordonner preuve des faits allégués dans la requête. (Worthington, failli, et The Mechanics Bank, réclamante, et *Ball et al.*, conts, C. S., Montréal, 14 mars 1873, Јонкson, J., 17 J., p. 169; 3 R. C., p. 90; 4 R. L., p. 680, et 23 R. J. R. Q., p. 143.)

DES JURÉS. Après que les six jurés parlant la langue de l'accusé ont été assermentés, il fant appeier la liste régulièrement et la Couronne n'est pas tenue de montrer causa lorsqu'elle récuse un juré avant que la liste entière ait été appelée; la liste peut même être appelée deux fois, pour voir si ceux qui n'ont pas répondu sont dans l'auditoire, avant que la Couronne ne soit tenue de montrer cause. (La Reine vs Dougall et al., C. B. R., justice criminelle, Montréal, 9, 10 et 11 avril 1874, RAMSAY, J., 18 J., 85; 7 R. L., 187; 23 R. J. R. Q., p. 472.)

DES JURÉS. La Couronne a le même droit de récuser un juré dans les procès pour délits que dans les procès pour félonie. Ce droit lui a été reconnu par le ch. 29 des statuts du Canada de 1869, 32-33 Vict., intitulé: "Acte concernant la procédure dans les causes criminelles ainsi que certaines autres matières relatives à la loi criminelle," qui décrète, sec. 38, que: "Dans tous procès criminels pour trahison, félonie ou délit, quatre jurés pourront être péremptoirement récusés par la Couronne; mais cette disposition ne préjudiciera pas au droit de la Couronne de faire mettre de côté 'out juré jusqu'à ce que la liste soit épuisée ou de récuser

tegistres de

ulé : " Actesi le synilli, comme ou rémunéeprésentant entendre, ni à sa propre la personne cune contesla personne 871, 34 Vict., ite 1869," dén le cas, sera iage jusqu'au e des parties que pour les tième section elle incompéière prescrite t les cas où le de récusation. syndic à une n doit inférer ne " tout juge permise, cette k qui exercent es les plus reslimites de ses ux termes de de la part d'un re des moyens it qu'il lui soit yndic de suss faits allégués lechanics Bank, l,14 mars 1873, R. L., p. 680, et

la langue de la liste régumontrer cause entière ait été deux fois, pour ms l'auditoire, montrer cause. ice criminelle, 18 J., 85; 7 R.

récuser un juré es pour félonie. statuts du Caconcernant la si que certaines ," qui décrète, pour trahison, remptoirement sition ne préjumettre de côté e ou de récuser

tout nombre de jurés pour cause." (Le Reine vs Dougall et al., C. B. R., justice criminelle, Montreal, 9, 10 et 11 avril 1874, RAMSAY, J., 18 J., 85; 7 R. L., 187; 23 R. J. R. Q., 472.)
RECUSATION DES JURES. La Couronne peut demander de nouveau,

sans donner de motifs, la récusation d'un juré dont le nom a été appelé une seconde fois avant épuisement complet des listes. (La Reine vs Dougall et al., C. B. R., Montréal, 22 sep-tembre 1874, Dorion, J. en C., Monk, J., Taschereau, J., dissident, Ramsay, J., et Sanborn, J., 18 J., p. 242; 23 R.

J. R. Q., p. 484.) REDDITION DE COMPTE. L'art. 583 C. P. C. n'a pas modifié le droit du demandeur en reddition de compte, de contraindre le defendeur, par toutes les voies que de droit, à rendre compte, et les cours de justice peuvent toujours, comme cela s'est pratiqué de tout temps, condamner un défendenr qui n'obe it pas à la sentence qui l'oblige à rendre compte, à payer une somme comme provision ou comme pénalité, ou enfin pour tenir lien de reliquat de compte. C'était la pratique sous l'Ord. de 1667 et cela a toujours été pratiqué ici, même depuis le code. (Roy et Gauthier, C. B. R., en appel, Québec, 7 décembre 1880, Dorion, J. en C., Monk, J., Ramsay, J., Cross, J., et Baby, J. A., 1 D. C. d'Ap., pp. 96 et 149; 2. R. J. R. Q.,

p. 194.)
DE COMPTE. La tutelle étant finie, le tuteur doit un compte de l'administration des biens du mineur; s'il ne le fait, le mineur peut l'assigner pour lui faire rendre compte. L'action en reddition de compte contre le tuteur ne peut être formée qu'après la tutelle finie. (Burcau vs Moore, C. S., Montréal, 20 septembre 1872, TORRANCE, J., 17 J., p. 235, et 23 R. J. R.

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Q., p. 202.)

DE COMPTE. Lorsque le défendeur ne rend pas compte dans le délai fixé par le jugement qui l'a condamné à rendre compte, le demandeur peut ou établir lui-même un compte d'après l'art. 533 C. P. C., ou suivant la pratique suivie avant le code, faire condamner le défendenr à lui payer soit une ou plusieurs provisions jusqu'à ce qu'il ait rendu compte, soit une somme définitive pour tenir lieu de reliquat de compte, à la discrétion de la cour. (Roy et Gauthier, C. B. R., en appel, Québec, 7 décembre 1880, DORION, J. en C., MONK, J., RAMSAY, J., CROSS, J. et BABY, J. A., 1 D. C. d'Ap., pp. 96 et 149, et 23 R. J. R. Q., p. 194.)

DE COMPTE. Lorsqu'un associé poursuit son coassocié en reddition de compte, il n'est pas obligé d'alléguer qu'il a luimandre rendu compte, con de la light ren en se à render; il lui

même rendu compte, ou qu'il n'en a pas à rendre; il lui suffit d'alléguer que le défendeur a en sa possession des biens ou somme de deniers appartenant à la société qui a existé entre eux et dont il n'a pas rendu compte. (Roy et Gauthier, C. B. R., en appel, Québec, 7 décembre 1880, Dorion, J. en C., Monk, J., Ramsay, J., Cross, J. et Baby, J. A., 1 D. C. d'Ap., pp. 96 et 149, et 23 R. J. R. Q., p. 194.)

REGISTRES DE L'ETAT CIVIL. Sur requête pour la rectification d'un

acte de naissance dans les registres d'une paroisse, la cour peut, avant faire droit, ordonner que la délimitation de cette paroisse soit constatée et établie par un arpenteur, suivant la loi réglant son érection civile. Arts 75 à 78 C. C. (Ex parte Devoyau dit Laframboise, req., et Venard, intimé, C. S., Montréal, 3 janvier 1872, Berthelor, J., 17 J., p. 49, et 28 R.

J. R. Q., p. 75.)
REPRESENTATION:—Vide Substitution.

REQUETE CIVILE :- " JUGEMENT DE DISTRIBUTION. :--- 16 PROCÉDURE.

RESPONSABILITE. Le ch. 24 des S. R. B. C. de 1860, intitulé: "Acte concernant les municipalités et les chemins dans le Bas-Canada," contenait les dispositions suivantes, sec. 51, § 10: "Chaque personne sera responsable des dommages résultant de la non-exécution des travaux qu'elle sera tenue de faire, et si plusieurs personnes sont tenues conjointement et solidairement, elles seront responsables conjointement et solidairement." Sec. 51, § 4: "Nul avis ne sera nécessaire pour obliger une personne à faire ou entretenir un chemin de front auquel elle sera seule tenue." Sec. 43, § 2: "Le chemin de front de chaque lot sera fait et entretenu par le propriétaire ou l'occupant de ce lot." Jugé, sous ces dispositions, que le propriétaire d'une terre est personnellement responsable des dommages causés par le mauvais état de la partie du chemin de front qui borde sa propriété. (Goupille vs Corporation du canton de Chester-Est, et ladite Corporation du canton de Chester-Est, et ladite Corporation du canton de Chester-Est, et ladite Corporation du canton de Chester-Est, et la la la partie du chemin la 1871, Polette, J., 3 R. L., p. 3; 23 R. J. R. Q., p. 365.)

Le gouvernement, pour des motifs d'ordre public, ne se rend pas responsable des lettres recommandées, et, en vertu de la présomption juris et de jure que la Couronne ne fait pas de tort, il ne peut, en aucun cas, être tenu de rembourser les sommes que contiennent les lettres recommandées qui ont été perdues. Les employés de la poste, comme le gouvernement, n'encourent de leur côté, aucune responsabilité, relativement aux lettres recommandées, à moins qu'il n'y ait négligence personnelle. Un maître de poste n'est pas responsable de la perte d'une lettre recommandée, à moins qu'il n'y ait preuve qu'il y a eu faute et néglignce de sa part. Quelle que soit la valeur de la lettre perdue, si le maître de poste prouve clairement qu'il n'y a pas eu négligence de sa part et qu'il n'a pas failli à son devoir, il ne peut être tenu au remboursement. (Delaporte et al. vs Madden, C. S., Beauharnois, 18 mars 1872, Dunkin, J., 17 J., p. 29, et 23 R. J. R. Q., p. 34.)

Le mari qui a fait défense à un marchand de faire des avances à son épouse ou à sa famille, sous peine d'en perdre le montant, doit cependant être condamné à payer le prix d'effets et marchandises vendus et livrés à sa famille lorsque ces effets et marchandises ont servi à l'usage de la famille, et qu'il a connu le fait des dites avances. (Bonnier dit Plante vs Bonnier dit Plante, C. C., Sorel, 8 mai 1871, Sicotte, J., 3 R. L., 35; 23 R. J. R. Q., p. 375.)

Une compagnie de chemin de fer n'est pas responsable de la perte des effets ou marchandiscs qu'elle a entrepris de transporter, lorsque ces effets ou marchandises ont été égarés sur un parcours étranger à son chemin, hors des limites de sa dernière station. (Chartier et al. vs. La Cie du Grand-Tronc de chemin de fer du Canada, C. S., Montréal, 19 avril 1872, MACKAY, J., 17 J., p. 26, et 23 R. J. R. Q., p. 31.)
Une corporation municipale est responsable des actes de ses

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Une corporation municipale est responsable des actes de ses officiers, si elle les a ordonnés ou si elle essaie de les justifier. (Doyon et Corporation de la paroisse de St-Joseph, C. B. R., en appel, Québec, 20 mars 1873, Duval, J. en C., Drummond, J., Badeley, J., et Monk, J., infirmant le jugement de C. S., Québec, 13 juin 1872, Bosst, J., 17 J., p. 193; 4 R. L., p. 684, et 23 R. J. R. Q., p. 156.)

Une corporation municipale est responsable des dommages soufferts par une femme dans une chute de voiture qu'aurait fait verser une élévation naturelle sur un chemin sous tulé : " Acte dans le Bassec. 51, § 10: mages résulera tenue de onjointement ointement et ra nécessaire r un chemin § 2 : " Le chenu par le pros ces disposirsonnellement vais état de la été. (Goupille ite Corporation , C. C., Artha-p. 3; 23 R. J.

olic, ne se rend t, en vertu de re ne fait pas de embourser les andées qui ont ne le gouvernensabilité, relans qu'il n'y ait n'est pas res-andée, à moins négligace de sa erdue, si le maias eu négligence ; il ne peut être s *Madden*, C. S., ., p. 29, et 23 R.

aire des avances perdre le mon-r le prix d'effets tille lorsque ces le la famille, et unier dit Plante 871, Sicotte, J., sponsable de la

trepris de transnt été égarés sur les limites de sa du Grand-Tronc al, 19 avril 1872, 31.)

des actes de ses aie de les justi-St-Joseph, C. B. J. en C., Drumt le jugement de p. 193; 4 R. L.,

des dommages e voiture qu'auun chemin sons

· le contrôle de la corporation, quoique le chemin, vis-à-vis cette élévation, fut assez large pour permettre à deux voitures d'y passer de front et qu'au moment de l'accident le cheval fut conduit par une fillette de douze ans, ayant été prouvé que ladite élévation ayait été la cause d'acciete prouve que la corporation avait été la cause d'accidents antérieurs et que la corporation avait été avertie de
la faire disparatre. (Higgins et vir vs Corporation du village
de Richmond, C. S. R., Montréal, 30 novembre 1872,
MACKAY, J., TORRANCE, J., et BEAUDRY, J., dissident, confirmant le jugement de C. S., 17 J., p. 246; 2 R. C., p. 476;
23 R. J. R. Q., p. 214.)

RESPONSABILITE. Pour qu'un propriétaire puisse réclamer une in-

demnité par suite du nivelage des rues, il faut que ce nivelage ait été fait sur la devanture de sa propriété; le nivelage sur le front du voisin n'est pas suffisa it pour lui donner droit à une indemnité, surtout s'il n'apparaît pas que le nivelage ait été fait avec l'autorisation de la corporation. (Mercantile Library Association vs Corporation de Montréal, C. S., Montréal, 31 octobre 1871, Mondeler, J., 3 R. L., p. 441; 2 R. C., p. 107; 23 R. J. R. Q., p. 518.)

:- Vide ABORDAGE,

44 ARRESTATION MALICIEUSE.

66 ASSURANCE CONTRE L'INCENDIE. 44 CLAUSE CONDITIONNELLE.

46 CORPORATION MUNICIPALE.

44 MAITRE DE POSTE. 64 NÉGLIGENUE.

VOITURIER. DES OFFICIERS DE L'ARMEE. Les officiers de l'armée ne peuvent être condamnés en dommages pour actes faits en leur qualité, à moins qu'ils n'aient commis quelque injustice évidente. (Barnes vs Mostyn, C. S., Montréal, 17 décembre 1872, Mackay, J., 17 J., p. 288; 4 R. L., p. 542; 2 R. C., p. 482, et 23 R. J. R. Q., p. 237.) DU LOCATAIRE:—Vide Louage.

REVISION. Il y a lieu à la revision, devant trois juges de la Cour Supérieure, d'un jugement de la Cour de Circuit cassant un

Supérieure, d'un jugement de la Cour de Circuit cassant un rôle d'évaluation, et, dans ce cas, un dépôt de \$20 est suffisant. (M. Laren et Corporation du canton de Buckingham, C. S. R., Montréal, 21 décembre 1872, Mackay, J., Torrance, J., et Beaudry, J., 17 J., p. 53, et 23 R.J.R.Q., p. 80.)

"Une inscription pour revision "par la Cour Supérieure" est suffisante; il n'est pas nécessaire de dire "par trois juges de la Cour Supérieure." (McLaren et Corporation du canton de Buckingham, C. S. R., Montréal, 21 décembre 1872, Mackay, J., Torrance, J., et Beaudry, J., 17 J., p. 53, et 23 R. J. R. Q., p. 80.)

RIVIERE:—Vide Action Possessoire.

ROLE D'EVALUATION. Les arts 100 et 698 C. M. n'out trait ou'aux

ROLE D'EVALUATION. Les arts 100 et 698 C. M. n'ont trait qu'aux actes faits par le conseil municipal, à "tout règlement" suivant l'art. 698, et à "tout procès verbal, rôle, résolution ou autre ordonnance du conseil municipal" suivant l'art. 100. Le rôle d'évaluation n'est pas un acte du conseil municipal; c'est l'acte d'officiers municipaux (art. 365) qui, quoique nommés par le conseil, ne sont pas sous son contrôle, leurs fonctions étant réglées par la loi (arts 366, 375, 585, 716, 717, 727, 728, 730, 731 et 733). Le conseil municipal ne peut que reviser, modifier ou compléter le rôle d'évaluation (art. 734). Les amendements qu'il y fait sont des actes tombant dans la catégorie de ceux mentionnés en l'art. 100, mais le rôle lui-même n'est pas un des rôles dont parle cet article, et la

Cour de Circuit est, en conséquence, incompétente à décider de sa validité. (Laurent vs Corporation du village de Saint-Jean-Baptiste, C. C., Montréal, 31 mars 1873, Beaudry, J., 17 J., p. 192; 4 R. L., p. 684, et 23 R. J. R. Q., p. 154.) RUE. L'art, 407 C. C. renferme un principe fondamental de l'ancien

droit français qui, en permettant de prendre une propriété privée, pour cause d'utilité publique, affirmaît, d'une manière générale, son inviolabilité, en exigeant la palement préalable d'une juste indemnité. Cet article 407 est completé par l'article 1589 C. C. Dans les lois spéciales passées en France et en Canada, le principe de l'indemnité préalable, dans les cas d'expropriation proprement dite, a généralement été maintenu. Mais on a fait exception pour les travaux d'urgence; et il est évident que des lois spéciales passées par l'autorité compétente peuvent adopter, rejeter ou modifier ce principe. Depuis longtemps, on a fait une distinction, en France, et, de fait, elle existe dans la nature des choses, entre l'expropriation proprement dite, pour laquelle il y a lieu à l'indemnité préalable, et le simple dommage, et on a aussi fait une distinction entre le dommage direct qui donne à celui qui l'éprouve droit à une indemnité, et le dommage indirect qui ne donne pas ce droit. En France, aujourd'hui, il paraît admis que le dommage aux droits d'accès et de sortie des rues ne constitue pas une expropriation. De fait, par une interprétation raisonnable de l'article 407 C. C., il ne parait s'appliquer qu'aux propriétés qui peuvent être actuellement cédées, et pour lesquelles une indemnité peut être établie avant la cession. L'indemnité accordée, en France, pour le dommage différent de l'expropriation paraît être appuyée sur un principe d'équité que les lois spéciales ont adopté sujet aux règles prescrites par ces lois. Le dommage autre que celui résultant de la cession de propriété représente la perte éprouvée par l'exécution de travaux, et en résultant, et il ne serait pas raisonnable d'exiger une indemnité préalable; de fait, dans bien des cas, l'étendue du dommage ne peut être constatée au préalable. Il n'est pas la suite d'une expropriation, mais la suite de l'exécution de travaux. Le propriétaire d'immeubles longeant une rue que l'autorité municipale, avec la sanction législative, fait fermer à une de ses extrémités, n'est pas exproprié, et il n'a pas droit à une indemnité préalable, droit qui, s'il existait, rendrait la corporation municipale coupable de voie de fait, parce qu'elle n'aurait pas payé l'indemnité préalable. Par le droit français, le propriétaire d'un terrain longeant une rue a droit d'accès et de sortie par cette rue. Le droit d'accès à une maison est essentiel à sa jouissance, et si, par suite de changement dans la rue, le propriétaire ne peut s'y rendre ou en sortir, ou est gêné dans ce droit, il ne paraît pas douteux que, par la loi française, il a droit à une indemnité pour le tort qu'il éprouve. Mais la fermeture d'une rue à une de ses extrémités ne produit pas ces conséquences. Le propriétaire peut communiquer à la rue, et, de cette rue, par l'extrémité ouverte aux autres rues, dans toute la municipalité. Le seul effet de faire d'une rue un cul-de-sac est d'obliger les propriétaires longeant cette rue à faire un plus long circuit pour communiquer à certaines parties de la municipalité. Suivant le droit français et le droit dans la province de Québec, la fermeture d'une rue, à une de ses extrémités, lorsqu'elle reste ouverte du côté opposé, et se trouve encore ainsi en communication avec les différentes

ite à décider ige de Saint-BEAUDRY, J., . 154.) de l'ancien

nne propriété rmait, d'une eant le paierticle 407 est lois spéciales e l'indemnité ement dite, a xception pour que des lois peuvent adopis longtemps, ait, elle existe on proprement préalable, et le nction entre le prouve droit à e donne pas ce nis que le domes ne constitue erprétation rairaft s'appliquer llement cédées, établie avant la our le dommage ppuyée sur un adopté sujet aux autre que celui résente la perte n résultant, et il mnité préalable; ommage ne peut s la suite d'une de travaux. Le ne que l'autorité ait fermer à une il n'a pas droit à stait, rendrait la e de fait, parce able. Par le droit geant une rue a Le droit d'accès à et si, par suite de e peut s'y rendre il ne paraît pas à une indemnité eture d'une rue à onséquences. Le et, de cette rue, s, dans toute la rue un cui-de-sac tte rue à faire un rtaines parties de s et le droit dans rue, à une de ses côté opposé, et se vec les différentes

parties de la municipalité, ne donne pas aux propriétaires de terrains longeant cette rue droit à une indemnité, ces terrains n'étant pas privés de leur accès à la voie publique et la dépréciation qu'ils éprouvent ne constituant pas un dommage direct et matériel. Le passage qu'un propriétaire a sur la partie d'une rue qui n'est pas nécessaire à l'accès immé liat à la maison, ne constitue pas un droit, mais un avantage dont il peut être privé sans compensation, comme si, par exemple, l'administration diminuait la largeur d'une rue, ou la fermait par l'un de ses bouts, de manière à en faire une impasse. Si la rue était fermée, à ses deux extrémités, on pourrait probablement prétendre que cela détruirait le droit d'accès et de sortie appartenant aux propriétaires des maisons sur cette rue ainsi fermée, et donnerait lieu à des dommages. Le propriétaire d'une maison qui, par la fermeture de l'extrémité d'une rue, perd une certaine clientèle qui communiquait à cette maison par ce bout de la rue en passant sur la voie d'un chemin de fer, contrairement aux règlements de la compagnie de chemin de fer, n'a pas droit d'être indemnisé pour cette perte. Lorsqu'un statut indique un mode de déterminer l'indemnité payable pour une expropriation, il enlève par là même le recours par l'action ordinaire. (Cité de Montrèal et Drummond, Conseil Privé, Londres, 16 mai 1876, 18 J., p. 225; 22 J., p. 1; 1 L. R., A. C., p. 384; 23 R. J. R. Q., p. 424.)

RUE: - Vide RESPONSABILITÉ.

SAISIE-ARRET. La saisie des effets d'un débiteur en la possession actuelle d'un tiers qui n'y fait pas opposition, est valide sans qu'il soit nécessaire d'avoir le consentement formel du tiers, son défaut de faire opposition étant suffisant pour la valider. (Brossurd et Tison et al., C. B. R., en appel, Montréal, 24 juin 1873, Duval, J. en C., Drummond, J., Badelry, J., Monk, J., et Torrance, J., infirmant le jugement de C. S. R., Montréal, 28 juin 1872, qui avait confirmé le jugement de C. S., Montréal, 26 avril 1872, 18 J., p. 54; 23 R. J. R. Q., p. 339.) ARRET. L'on peut faire émettre un bref de saisie-arrêt contre

le curateur d'un interdit pour l'obliger à payer au demandeur le montant qu'il doit personnellement à l'interdit en vertu d'un jugement contre l'interdit et le curateur. (Crebassa vs Fourquin dit Léveillée et al., et Bergeron et al., t. s., C. C., Sorel, 27 septembre 1869, T. J. J. Loranger, J., 3 R. L., p. 57; 23 R. J. R. Q., p. 384.) ARRET. Une saisie pratiquée à la poursuite d'un créancier, à

l'effet de saisir arrêter, entre les mains du tuteur personnellement, toute somme d'argent qu'il peut devoir au tuteur. est illégale et nulle, par le motif que le compte du tiers-saisi, comme tuteur, ne peut être débattu par la contestation de la déclaration sur saisse arrêt, mais doit l'être par une contestation directe avec la partie intéressée. (Dorion vs Dumont, et Dumont, t. s., et Dorion, cont., C. B. R., en appel, Montréal, 10 décembre 1870, DUVAL, J. en C., CARON, J., BADGLEY, J., Drummond, J., et Monk, J., confirmant le jugement de C. S., 10 mai 1866, Smith, J., 3 R. L., p. 60; 23 R. J. R. Q., p. 386.) ARRET AVANT JUGEMENT. Une saisie arrêt avant juge-

ment sera cassée sur motion, si l'affidavit qui en fait la base n'allègue pas que le débiteur "a caché ou est sur le point de cacher ses biens et effets." (McNeven vs McAndrew, C. S., Montréal, 30 septembre 1873, Torrance, J., 18 J., p. 70;

23 R. J. R. Q., p. 356.)

SAISIE-ARRET AVANT JUGEMENT: - Vide CAPIAS.

REVENDICATION :- Vide PROCÉDURE. SEQUESTRE. Une requête pour séquestre doit contenir les moyens sur lesquels est fondée la demande en séquestre; il n'est pas suffisant d'alléguer que le requérant a intérêt à ce que les propriétés soient sequestrées. (L'Asile de Sainte-Brigitte vs Fernay, C. S., Québec, 18 février 1871, Менкрітн, J. en C., 3 R. L., p. 32; 1 R. C., p. 246; 23 R. J. R. Q., p. 372.)

SHERIF: - Vide Contrainth par corps.

SIGNIFICATION. Toutes significations à un réclamant qui est syndic officiel, mais qui n'agit pas en cette qualité dans la faillite dans laquelle il réclame, doivent être faites à personne ou à son domicile; celles faites à son bureau de syndic, en parlant à son clerc, sont illégales. (In re Martin et al., faillis, et Saint-Amour, syndic, et Stuart, réclamant et partie colloquée, et Charland, cont., C. S. R., Montréal, 29 décembre 1871, MONDELET, J., BERTHELOT, J., et MACKAY, J., 3 R. L., p. 382; 2 R. C., p. 107; 23 R. J. R. Q., p. 413.) DE TRANSPORT:—Vide Transport.

SOCIETE. Le ch. 65 des S. R. B. C. de 1861, intitulé: "Acte concernant les sociétés," décrétait, sec. 1, que "toutes personnes reunies en société, dans le Bas-Canada, pour les fins du commerce, de la manufacture ou de la mécanique, ou pour construire des chemins, écluses, ponts, ou autres travaux, ou pour coloniser, établir ou vendre des terres, transmettront au protonotaire de la Cour Supérieure dans chaque district, et au régistrateur de chaque comté où elles font ou ont l'intention de faire des affaires, une déclaration par écrit, signée par les divers membres de la société, étant tous alors dans cette province; et s'il y a des membres absents à cette époque, alors par les membres présents, tant en leur propre nom qu'au nom de leurs coassociés absents, en vertu d'une autorisation spéciale à cet effet." Aux termes de cette section et de l'art, 1834 C. C., un contrat fait par deux personnes, par lequel elles s'engagent à fournir, à une compagnie de chemin de fer, une certaine quantité de traverses, pour un prix convenu à tant par mille traverses, constitue entre elles une société commerciale qui requiert l'enregistrement d'une déclaration de société aux endroits indiqués par la loi. Jugé aussi, sous ces mêmes dispositions, que les personnes qui forment une société ne sont tenues d'enregistrer une déclaration de sa formation qu'au bureau d'enregistrement des comtés et au bureau du protonotaire des districts où la société a des bureaux d'affaires et des établissements de commerce, et qu'elles ne sont pas obligées de faire cet enregistrement dans les comtés et districts où la société ne fait que des actes de commerce isolés. (Larose vs Patton, C. S., Saint-Hyacinthe, 25 novembre 1872, St-COTTE, J., 17 J., p. 52; 4 R. L., p. 369, et 23 R. J. R Q., p. 78.)

Chacun des associes est prepositus negotiis societatis et, virtule officii, a pouvoir, pour l'avantage de la soci té, de vendre les marchandises, acheter, payer et recevoir, dans le cours ordinaire des affaires qui forment l'objet de la société. S'il intervient une convention qui limite le pouvoir des associés, cette convention n'est valide que pour les as ociés; elle n'a pas d'effet vis-à-vis les tiers, à moins que ces derniers n'aient connu les restrictions stipulées. L'acte d'un associé n'est considéré être l'acte de la société toute entière, ou de tous les associés, qu'autant que cet acte est fait pour les affaires do la société; cependant un associé peut obliger ses coassociés pour des matières en dehors du cours ordi-

es moyens sur ; il n'est pas t à ce que les inte-Brigitte vs ргтн, J. en C., p. 372.)

qui est syndic dans la faillite à personne ou syndic, en par-et al., faillis, et et partie collo-l, 29 décembre AY, J., 3 R. L.,

Acte concernant es personnes reules fins du comanique, ou pour autres travaux, terres, transmeture dans chaque mté où elles font ne déclaration par sociét, étant tous nembres absents à sents, tant en leur s absents, en vertu ux termes de cette fait par deux per-nir, à une compa-ntité de traverses, raverses, constitue requiert l'enregisendroits indiqués ispositions, que les t tenues d'enregis-'au bureau d'enrei protonotaire des iffaires et des étasont pas obligées ntés et districts où ovembre 1872, Si-3 R. J. R Q., p. 78.) societatis et. virtute societé, de vendre evoir, dans le cours de la société. S'il pouvoir des assopour les as ociés; moins que ces der oulées. L'acte d'un ciété toute entière, associé peut obliger hors du cours ordinaire des affaires de la société, si ces matières ont quelque lien commun avec les affaires ordinaires de la société. Une convention, intervenue entre deux as-ociés faisant affaires comme fondeurs en fer, qu'aucun contrat d'achat on de vente de matières d'une valeur de plus de \$100 ne serait fait par l'un des associés sans le consentement de l'autre, n'empêche pas la société d'être garante d'une vente de fonte en gueuse excédant ladite somme et faite sous contrat à un tiers de bonne foi par l'un des a-sociés, à l'insu de l'autre, m e telle vente étant une transaction du genre de celles que tait la société, et l'acheteur ne connaissant pas, au moment de l'achat, la restriction stipulée. (Cuvillier et al. vs Gilbert et al., C. S. R., Montréal, 29 novembre 1-73, Mondelet, J., dissident, Torrance, J., et Beaudry, J., confirmant le jugement de C.S., Montréal, 17 décembre 1872, Mackay, J., 18 J., p. 22; 4 R. L., p. 655; 5 R. L., p. 468; 23 R. J. R. Q., p. 311.) Le juge Mondeler était d'avis d'infirmer le jugement de C. S., par les motifs que les deux associés, parce qu'ils faisaient affaires comme fondeurs en fer, ne devaient pas être pour cela réputés négociants en fer; que c'était leur devoir de se conformer à la restriction stipulée; que la vente ainsi faite était une transaction commerciale en dehors du cours ordinaire des affaires de la société, et que l'acheteur était tenu de connaître quel était le genre

d'affaires des deux associés. SOCIETE. On doit connaître celui avec qui on fait des affaires et s'abstenir d'acheter d'une personne qui n'a pas le droit de vendro. Cette règle s'applique à toutes les transactions quelles qu'elles soient. Avant de faire des affaires avec une société, il faut s'enquérir s'il y a eu contrat entre les associés et si ce contrat a été enregistré. S'il n'y a pas eu contrat ou si le contrat n'a pas été enregistré, le public est supposé connaître quel commerce la société fait, puisqu'elle fait ce commerce au vu et su de tout le monde. En conséquence, si l'un des associés fait une transaction qui soit dans le cours ordinaire des affaires formant l'objet de la société, il oblige ses conssociés, qu'ils aient ou non autorisé la transaction; mais si l'un des associés fait une transaction qui n'est pas du ressort de la société à raison des restrictions stipulées par écrit au contrat ou, sinon écrites, découlant naturellement et manifestement du genre de commerce que fait la société et par là même supposées connues du public, une telle transaction n'oblige pas la société. (Curillier et al. vs Gilbert et al., C. S. R., Monréal, 29 novembre 1873, opinion de Mondellet, J., dissident, 23 R. J. R. Q., p. 313.) Un associé n'a pas le droit de disposer des biens de la société

pour son avantage personnel; toute convention à cet effet est illégale et nulle. (Poston et al. vs. Watters, C. S., Québec, 21 janvier 1871, Такеневац, J., 2 R. L., p. 736; 1 R. С.,

p. 245; 23 R. J. R. Q, p. 364,) :- Vide Cission de biens.

:- Vide Composition

COMMERCIALE. La société formée entre un shérif, un avocat et un marchand, pour l'exploitation d'un moulin à scie, est, aux termes de l'art. 1863 C.C., une société commerciale. (Couturier vs Brassard et al., C.C., Murray Bay, 9 décembre 1873, H. E. TASCHERKAU, J., 18 J., p. 8; 23 R.J. R.Q., p. 297.)

SOLIDARITE: - Vide OBLIGATION SOLIDAIRE.

t acte est fait pour SUBROGATION LEGALE. Avant le code, la subrogation légale, sans demande, était accordée à l'acquéreur qui employait son prix au paiement des créanciers auxquels l'héritage était hypothéqué et qui était ensuite évincé pour cause non dérivant de lui, et ce quand même il aurait été chargé par son acte d'acquisition de payer tels crénneiers. La revente volontaire par le premier acquéreur, après avoir ainsi payé les créanciers inscrits, et l'éviction par vente judiciaire sur le second acquéreur, à la demande de créanciers hypothécaires antérieurs à l'acquisition du premier acheteur, n'ont pas eu pour conséquence de nullifier la subrogation. (Lavallée vs Tétreau, et Roy, opp. et coll., et Lavallée. cont., C.S., Saint-Hyacinthe, 27 février 1873, Sicotte, J., 17 J., p. 248, et 23 R. J. R. Q., p. 216.)

SUBSTITUTION. La disposition par laquelle le testateur déclare que les petits-enfants n'auront la propriété que six mois après le décès du dernier des enfants ne peut avoir l'effet de créer un autre degré de substitution; elle vent dire seulement que le partage ne pourra être provoqué par les petits-enfants qu'à cette époque. (Armstrong vs. Dufresnay et al., C. S., Montréal, 30 décembre 1870, Beaudry, J., 3 R. L., p. 366; 23 R. J. R. Q., p. 404.)

La disposition d'un testament ainsi conque: "Je donne et lègue la jouissance à mes enfants pour par eux en jouir à titre de constitut et précaire leur vie durant...... et, après le décès desdits légataires en usufruit, la propriété des dits biensfonds appartiendra à leurs enfants nés et à naître", contient une substitution malgré les termes qui y sont employés. Cette autre disposition que les biens du testateur ne seront partagés, entre ses petits-enfants, également qu'après le décès des enfants dudit testateur, ne cesse de comporter l'idée de substitution. Le partage entre les petitsenfants, à l'époque où, d'après le testament, il pouvait être fait, devait avoir lieu par souche et non par tête. (Roy et vir et Gauvin et al., C.S.R., Montréal, 31 mai 1873, MacKay, J., dissident, Torrance, J., et Beaudry, J., infirmant le jugement de C. S., Montréal, 29 décembre 1871, MacKay, J., 14 R. L., 270; 3 R. L., 443; 2 R. C., 109; 23 R. J. R. Q., 518.)

La représentation en ligne directe a lieu en matière de substitution. (Peloquin et al. et Brunet et al., C. B. R., en appel, Montréal, 9 septembre 1871, Duval, J. en C., Caron, J., Drummond, J., Badgley, J., et Monk, J., confirmant le jugement de C. S., Sorel, 26 mars 1870, Loranger, J., 3 R. L.,

pp. 52 et 386; 23 R. J. R. Q., p. 378.)

Le mot enfant, employé en matière de succession testamentaire et de substitution en ligne descendante, comprend, par sa propre énergie, non seulement les enfants de l'instituant ou de l'institué, suivant le cas, mais encore leurs descendants dans tous les degrés sur la défaillance du degré indiqué dans la disposition, le degré le plus prochain devant néanmoins exclure les autres. (Peloquin et al. et Brunet et al., C. B. R., en appol, Montréal, 9 septembre 1871, Duval, J. en C., Caron, J., Drummon, J., Badgley, J., et Monk, J., confirmant le jugement de C. S., Sorel, 26 mars 1870, Loranger, J., 3 R. L., pp. 52 et 386; 23 R. J. R. Q.,

p. 378.)

"DE PROCUREUR:—Vide Procureur ad litem.

SURESTARIE. Le déchargeur d'un navire ne peut plaider, à une action pour surestaries, intentée contre le consignataire par le maître de ce navire, qu'au temps du déchargement une épidémie régnait sur les chevaux, laquelle en rendait un grand nombre impropres au service, et qu'il lui avait été impossible d'en avoir d'autres que ceux qu'il avait employés, par le motif que, s'il cut voulu payer le prix

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eause non dérichargé par son s. La revente oir ainsi payé judiciaire sur rciers hypothéacheteur, n'ont brogation. (Laallée, cont., C.S., I., 17 J., p. 248,

eur déclare que six mois après r l'effet de créer dire seulement les petits-enfants nay et al., C. S., 3 R. L., p. 366;

le donne et lègue a jouir à titra de t, après le décès é des dits bienst à naître ", cons qui y sont emiens du testateur , également qu'a · ne cesse de comentre les petitst, il pouvait être par tête. (*Roy ct* ні 1873, МасКау, ., infirmant le ju-1871, MACKAY, J., R. J. R. Q., 518.) ratière de substi-B. R., en appel, en C., Caron, J., nrirmant le juge-NGER, J., 3 R. L.,

ession testamenlante, comprend, nfants de l'instiiais encore leurs a défaillance du le plus prochain Peloquin et al. et) septembre 1871, BADGLEY, J., et , Sorel, 26 mars 3; 23 R. J. R. Q.,

plaider, à une consignataire par chargement une e en rendait un u'il lui avait été ux qu'il avait lu payer le prix

qu'on lui demandait, il eût pu s'en procurer un nombre suffisant pour faire le déchargement dans le temps fixé; en conséquence, il sera condamné à payer les surestaries prouvées. (Lacroix vs. Jackson, C. S., Montréal, 9 juillet 1873, Torrance, J., 17 J., p. 329; 23 R. J. R. Q., p. 291.)

SURSIS: - Vide APPEL AU CONSEIL PRIVÉ. SYNDIC: - Vide Vente des créances d'un failli.

PUBLIQUE D'IMMEUBLES PAR UN SYNDIC.

SYNDICS D'ECOLES. La loi S. R. B. C. de 1861, ch. 15, intitulé: "Acte conce: nant l'allocation provinciale en faveur de l'éducation supérieure, et les écoles normales et communes," veut qu'il y ait, dans chaque municipalité, des écoles communes qui soient régies ou par des commissaires d'écoles, ou par des syndies d'écoles (sec. 27). Les commissaires d'écoles sont déclarés être corporation (sec. 53). Les syndics d'écoles sont également déclarés être corporation (sec. 57, § 3). Les pouvoirs, les responsabilités, le but, la succession, sont absolument les mêmes. Ce qui constitue essentiellement toute corporation, la continuité, existe pour les syndics comme pour les commissaires. Les syndics sont les représentants de la minorité religieuse, les commissaires, ceux de la majorité religieuse. Ces mots "majorité religieuse" ou "minorité religieuse," dans tous les actes relatifs à l'instruction publique, veulent dire la majorité ou minorité catholique, ou la majorité ou minorité protestante, selon le cas (Acte pour amender les lois concernant l'éducation en cette province, S. Q. de 1869, 32 Vict., ch. 16, sec. 38). On a fait une exception pour les juifs, en leur perme tant de se faire inscrire sur le rôle des catholiques ou des protestants, à leur choix (Acte pour amender et étendre les lois concernant l'éducation en cette province, S. Q. de 1870, 34 Vict., ch. 12, sec. 9). L'égalité des droits des minorités et des majorités est exprimée dans chaque clause de la loi (S. Q. de 1869, 32 Vict., ch 16). Toutes deux sont incorporées pour assurer le même objet: le gouvernement scolaire et l'avancement de l'éducation. Cette égalifé n'existerait pas si les avantages et les pouvoirs n'étaient pas les mêmes. La loi a créé une corporation de syndics d'écoles dans l'intérêt des minorités; elle les appelle et les nomme "syndics d'écoles," comme elle désigne et nomme la corporation de la majorité "commissuires d'écoles. Le nom corporatif des syndics est dans la loi comme celui des commissaires, implicitement aussi bien que par disposition expresse. Ce nom est purement et simplement: Les syndies d'écoles pour lu municipalité de....., dans le comté de (Cushing vs Syndics d'écoles pour la municipalité d' Actonvale, C.S., Saint-Hyacinthe, 29 avril 1873, Sicotte, J., 18 J., p. 21; 4 R. L., p. 531; 23 R. J. R. Q., p. 309.) A UNE FAILLITE:—*Vide* Procedure.

:- " RÉCUSATION.

TARIF. Dans toute cause où jugement a été obtenu sur production d'un affidavit, l'honoraire de l'avocat sera le même que si ce jugement eût été rendu sur la déposition d'un témoin en cour. (Damour et al. vs Bourdon, C. C., en chambre, 22 janvier 1873, MACKAY, J., 17 J., p. 85, et 23 R. J. R. Q., p. 109.)

TEMOIN. La réponse d'un témoin à une question touchant un fait étranger au litige, ne peut être contredite par la partie qui a fait la question. (Courtney vs Bowie, C. S., Montréal, 3 de cembre 1872, Torrance, J., 17 J., p. 47; 23 R.J.R. Q., p. 72.)

- TEMOIN. Le défendeur peut examiner comme témoin son codéfendeur, lorsque leurs défenses sont plaidées séparément. (Close vs Dixon et al., C. S., Montréal, 27 mars 1872, MACKAY, J., 4 R. L., p. 141, et 23 R. J. R. Q., p. 89.)
 - " Vide Examen des témoins.
 " Procédure criminelle.
- TESTAMENT. Toute personne est présumée saine d'esprit par la loi; cette présomption ne disparaît que lorsqu'il y a preuve concluante du contraire; mais, une fois établi qu'une personne est folle, il faut les témoignages les plus décisifs pour prouver qu'elle a eu des intervalles lucides, et en l'absence de tels témoignages, la validité d'un testament fait pendant un des intervalles allégués, ne se présume pas et ce testament doit être considéré comme nul. (Close vs Dixon et al., C. S., Montréal, 30 décembre 1872, Johnson, J., 17 J., p. 59, et 23 R. J. R. Q., p. 90.)
- ":—Vide Substitution.
 TIERCE OPPOSITION. Lorsque l'évaluation d'un termin soumis à expropriation dans la cité de Montréal a été mise de côté par la cour, le propriétaire du terrain ne peut former une tierce opposition à ce jugement, quoiqu'il n'ait pas été partie dans la première instance. (Corporation de la cité de Montréal, et Wilson, tiers opp., C. S., Montréal, 30 novembre 1870, MACKAY, J., 2 R. L., p 624; 1 R. C., p. 121; 23 R. J. P. O. p. 321.
- R. Q., p. 321.)

 TIERS SAISI. Le tiers saisi, en réponse à un bref de saisie-ariét après jugement, n'a pas droit de comparaître nar procureur, et une telle comparution sera, sur motion, rejetée du dossier. (Forbes et al. vs. Levis, et The Globe Mutual Life Ins. Co. of New York, t. s., C. S., Montréal, 19 février 1874, BEAUDRY, J.,
 - 18 J., p. 74; 23 R. J. R. Q., p. 421.)

 SAISI. Le tiers saisi est tenu de donner un état détaillé des effets qu'il a en sa possession et qui appartiennent au défendeur. (Grant et al. vs. Teasel, et McShane, t. s., C. S., Montréal, 31 octobre 1872, TORBANCE, J., 17 J., p. 163, et 23 R. J. R. Q., p. 136.)
 - SAISI. Le tiers saisi, qui déclare sous serment ne posséder aucun effet appartenant au défendeur et qui ensuite, interrogé comme témoin, admet avoir en sa possession un certain nombre d'articles de valeur appartenant au défendeur, mais dont il refuse de donner un état détaillé et précis, sera condamné, comme débiteur personnel, à payer la valeur de ces articles. (Grant et al. vs Teasel, et McSham, t. s., Montréal, 31 octobre 1872, TORBANCE, J., 17 J., p. 163, et 23 R. J. R. Q., p. 136.)
- TKANSPORT. Le cessionnaire d'une créance par transport non signifié au débiteur peut poursuivre ce dernier, et la signification de l'action équivaut à la signification du transport. (Lamoureux vs Renaud, C.C., Marieville, 15 mai 1871, Sicotte, J., 3 R. L., p. 30; 23 R. J. R. Q., p. 378.)
 - On doit signifier au débiteur une copie de l'acte de signification du transport fait à un tiers par son créancier. (McLennan vs Martin, et Martin, demandeur en faux, vs McLennan, défendeur en faux, C. C., 28 février 1871, Tor-RANCE, J., 17 J., p. 78; 3 R. L., p. 31; 1 R. C., p. 245, et 23 R. J. R. Q., p. 105.)
 - " :- Vide Action Hypothécaire.
 - " :- " ASSURANCE.
 - " :- " BILLET PROMISSOIRE,
 - " VENTE DE CRÉANCE.
 - " " VENTE DE DETTE.

on codéfendeur, ment. (Close vs 372, MACKAY, J,

esprit par la loi; l y a preuve conqu'une personne us décisifs pour s, et en l'absence nent fait pendant sume pas et ce (Close vs Dixon JOHNSON, J., 17 J.,

terrain soumis à été mise de côté peut former une 'il n'ait pas été ration de la cité de réal, 30 novembre ., p. 121; 23 R. J.

saisie-arrêt après par procureur, et ejetée du dossier. al Life Ins. Co. of 1874, BEAUDRY, J.,

ı état détaillé des partiennent au déhane, t. s., C. S., ., 17 J., p. 163, et

ment ne posséder lui ensuite, intera possession un rtenant au défenetat détaillé et bersonnel, à payer leasel, et McShaw, e, J., 17 J., p. 163,

sport non signifié et la signification transport. (Laі 1871, Ѕісотте, Ј.,

l'acte de signifir son créancier. deur en faux, vs évrier 1871, Tor-k. C., p. 245, et 23

"

TUTELLE. Le pupille devenu majeur peut référer à la décision d'arbitres les différends soulevés, entre lui et son tuteur, sur le compte que ce dernier lui rend, et cette référence n'est pas un traité relatif à la gestion et au compte de tutelle, mais un moyen expéditif et favorable au mineur pour faire décider ses contestations contre le compte que présente le tuteur. (Laporte dit Saint-George vs Laporte dit Saint-George, C. S., Sorel, 4 juillet 1871, Sicotte, J., 3 R. L., p. 37; 23 R. J. R. Q., p. 377.)

TUTEUR :- Vide MINEUR.

REDDITION DE COMPTE.

:- " SAISIE-ARRÊT.

U

USUFRUITIER. Le simple usufruitier d'un immeuble situé dans la censive de Montréal, a le droit de demander au Séminaire de Montréal la commutation des droits seigneuriaux. (Séminaire de St. Sulpice v. Durocher, C. S., Montréal, 29 novembre 1873, Beaudry, J., 17 J., 330; 23 R. J., R. Q., 291.)

L'usufruitier d'actions d'une banque a droit à la part, proportionnelle au nombre de ces actions, des bénéfices réalisés par la banque sur la vente des actions de son capita! augmenté, non souscrites par ceux y ayant droit. (Ross et vir v. Esdaile et al., C. S., Montréal, 30 avril 1873, MACKAY, J., 17 J., 301; 23 R. J. R. Q., 254.)

VENTE. Avant la promulgation du Code civil, art. 1472, le vendeur n'était pas tenu de transfèrer la propriété. (Armstrong vs Dufresnay et al., C. S., Montréal, 30 décembre 1870, BEAU-DRY, J., 3 R. L., p. 366; 23 R. J. R. Q., p. 404.) Celui qui achète des marchandises pour un montant élevé et

refuse, à leur livraison, de les accepter parce qu'elles ne seraient pas telles qu'on les lui avait représentées à la vente, doit, l'affaire ayant été sonmise à des arbitres qui ont adjugé en faveur du vendeur moins une légère somme pour les marchandises avariées, payer la différence entre le prix d'achat et la somme déduite par les arbitres, et, sur action par le vendeur, la sentence des arbitres sera confirmée. (Urguhart vs Moore, C. S., Montréal, 31 mars 1873, Mackay, J., 18 J., p. 71; 23 R. J. R. Q., p. 358.)

La clause, dans un acte de vente d'un immeuble possédé par plusieurs propriétaires, par laquelle les vendeurs qui ont signé se sont engagés à obtenir la ratification de la vente par un absent aussi propriétaire d'une partie de l'immeuble vendu, contient une condition suspensive; en conséquence, aucune action en revendication d'une portion du prix d'achat ne peut être portée tant que cette ratification n'a pas eu lieu. (Lenoir vs Desmarais et rir, C. S. R., Montréal, 30 avril 1873, Johnson, J., Mackay, J., et Beaudry, J., infir-mant le jugement de C. S., Montréal, 30 novembre 1872, Torrance, J., 17 J., p. 308; 3 R. C., p. 77, et 23 R. J. R. Q., p. 107.)

La stipulation, faite dans un acte de vente par l'acquéreur qu'il paiera, à l'acquit du vendeur, avec la réserve de dé-guerpir et de délaisser la propriété acquise par lui au cas où il jugerait à propos ou à son avantage de le faire, la somme stipulée par une obligation consentie par le vendeur et portant hypothèque sur ladite propriété, ne le rend par responsable personnellement du paiement de cette obligation, quoique cette indication de paiement ait été acceptée par le créancier et que signification de cette acceptation ait été faite à l'acquéreur. (Société permanente de construction du district de Montréal vs. Larose, C. S. R., Montréal, 29 décembre 1871, Mackay, J., Toferance, J., et Beaudry, J., infirmant le jugement de C. S., Montréal, 30 janvier 1871. Mondelett, J., 17 J., p. 87, et 23 R. J. R. Q., p. 112.)

VENTE :- Vide CRAINTE DE TROUBLE.

- :- " Enregistrement,
- " :- " FRAUDE.
- " :-- " MANDAT.
- " PREUVE TESTIMONIALE.

 DE CREANCE. Le cessionnaire d'une créance cédée apparemment, par l'acte de transport, pour bonne et valable censidération, peut poursuivre le recouvrement de la créance ainsi cédée, lors même que, par convention entre le cédant et le cessionnaire non exprimée à l'acte, il ne serait, relati
 - et le cessionnaire non exprimée à l'acte, il ne serait, relativement à la perception de cette créance, que le procureur et mandataire du cédant. (Nault vs. Charby et al., C. S. R., Montréal, 30 avril 1872, Mackay, J., Torrance, J., et Beaudry, J., infirmant le jugement de C. C., Saint-Hyacinthe, Sicotte, J., 18 J., p. 19; 23 R. J. R. Q., p. 306.)
 - DE CREANCE. Le cessionnaire d'une créance constatée par un jugement a droit de faire exécuter ce jugement au nom du cédant, même lorsque ce dernier est en faillite et qu'il n'a pas encore obtenu sa décharge. (Kittson vs. Delisle, et Lécuyer, t. s., et Delisle, cont., et Vassal, int., C. C., Sorel,
 - Lécuyer, t. s., et Delisle, cont., et Vassal, int., C. C., Sorel, 4 juillet 1871, Sicotte, J., 3 R. L., p. 69; 23 R.J.R.Q., p. 393.) DES CREANCES D'UN FAILLI. L'adjudicataire des créances d'un failli, à une vente faite par un syndic, doit alléguer dans son action contre un débitent de ce faille et prouver que toutes les formalités requises par la loi pour procéder à cette vente ont été observées; à défant de telle allégation, l'action de cet adjudicataire sera déboutée sur défense en droit. (Sainte-Marie vs. Ostell, C.S.R., Montréal, 30 novembre 1870. BERTHELOT, J., TOURANCE, J., et BEAUDRY, J., confirmant le jugement de C. S., Montréal, MAGKAY, J., 2 R. L.,
 - p. 624; 1 R. C., p. 120; 23 R. J. R. Q., p. 320.) DES CREANCES D'UN FAILLI, Le ch. 16 des S. C. de 1869, 32-33 Vict., intitulé: "Acte concernant la failuite," décrétait, sec. 44: "Après avoir opéré avec diligence la perception des créances, si le syndic trouve qu'il en reste encore dont la perception serait plus onéreuse qu'avantageuse à la masse, il pourra en faire rapport aux créanciers, et, avec leur consentement, il pourra obtenir un ordre du juge pour les vendre aux enchères publiques après les annonces que pourra exiger tel ordre; et, pendant la publication de ces annonces, le syndic dressera une liste des créances à vendre, à laquelle le public pourra avoir accè à son bureau, ainsi qu'à tous les documents et pièces justificatives de ces créances; mais toutes les créances se montant à plus de cent piastres seront vendues séparément, excepté tel qu'il est par le présent autrement prescrit." La sec. 46 décrétait : "La personne qui achètera une créance du syndic pourra en poursuivre le recouvrement en son propre nom, aussi efficacement que le failli l'aurait pu faire et que le syndic est par le présent autorisé à le faire; et un acte de vente signé et à elle délivré par le syndic, fera foi primé facie de cet achat, sans qu'il soit besoin de prouver la signature du

ie le rend pas de cette obliit été acceptée acceptation air de construction ontréal, 29 déudry, J., infirjanvier 1871, 5. 112.)

cédée apparemt valable consi-de la créance entre le cédant no serait, relatile procureur et y et al., C. S. R., CE, J., et BEAUaint-Hyacinthe,

3.)

e constatée par igement au nom faillite et qu'il son vs Deliste, et int., C. C., Sorel, 3.J.R.Q., p. 393.) aire des créances ic, doit alléguer failli et prouver pour procéder à telle allégation, e sur défense en tréal, 30 novem-EAUDRY, J., con-CKAY, J., 2 R. L.,

es S. C. de 1869, failuite," décré-nce la perception este encore dont antageuse à la anciers, et, avec re du juge pour es annonces que blication de ces des créances à è-à son bureau, ificatives de ces nt à plus de cent pté tel qu'il est ec. 46 décrétait : i syndic pourra pre nom, aussi a que le syndic n acte de vente i prima facie de la signature du

syndic; et nulle garantie, excepté quant à la bonne foi du syndic, ne sera créée par cette vente et transport, pas même la garantie que la créance est duc." L'art. 1509 C.C. répudie toute convention par laquelle le vendeur voudrait se soustraire à la garantie de ses faits personnels; toute convention dans ce sens y est déclarée nulle comme contraire, sans doute, à la morale ou à l'ordre public. De là il résulte que le syndic qui a vendu à l'enchère les créances d'un failli, suivant une liste sur laquelle était inscrit le montant originaire de chacune des créances vendues, sans déduction des paiements qu'il aurait reçus à compte, est tenu de rendre compte de ces paiements à l'acheteur et de l'en rembourser en entier, bien que la vente ait eu lieu sans aucune garantie quelconque, pas même celle de l'existence des créances, et que les personnes qui assistaient à la vente eussent été averties par l'encanteur que des acomptes avaient été reçus et que les montants inscrits sur la li-te étaient les montants originaires sans déduction des acomptes reçus, par les motifs que le syndic, en l'absence de toute autre garantie, est, aux termes de la sec. 46 et de l'art. 1509 C. C., tenu à la garantie de sa bonne foi et de ses faits personnels; que ladite sec. 46, en exemptant le syndic de la garantie de l'existence de la créance, n'entend l'exempter que de la responsabilité d'un fait qui lui serait impersonnel, comme l'entrée d'une fausse créance par le failli dans ses livres de compte, et non d'un fait qui lui est personnel comme la vente d'une créance ayant réellement existé, mais dont il aurait perçu le montant Jui-même avant de la mettre aux enchères; et que l'annonce verbale faite par l'encanteur, au moment de la vente, que les montants originaires étaient vendus sans déduction de ce qui aurait pu être reçu, n'avait aucune valeur légale, parce qu'elle n'était pas accompagnée d'un état indiquant en détail les sommes reçues et communiqué à tous les enchérisseurs. (Lafond et al. et Rankin, C. B. R., en appel, Montréal, 24 juin 1873, DUVAL, J. en C., dissident, DRUMMOND, J., BADGLEY, J., dissident, Monk, J., et Taschereau, J., infirmant le jugement de C. S. R., Montréal, 31 octobre 1871, BERTHELOT, J., MACKAY, J., et TORRANCE, J., qui avait confirmé le jugement de C. S., Montréal, 29 avril 1871, Moxpellet, J., 18 J., p. 62; 3 R. L., p. 449; 1 R. C., p. 474; 2 R. C., p. 107; 23 R. J. R. Q., p. 348.)

VENTE DE DETTE. L'écrit sous seing privé, par lequel une compagnie d'imprimerie et de publication autorise son président, qui est aussi le président d'une banque, à percevoir une dette due à la compagnie, cet écrit stipulant que cette dette lui a été transportée pour valeur reçue, ne peut être considéré comme un transport à la banque dont il est aussi le président, bien que la nature de la transaction semblât indiquer que telle était l'intention des parties. Lors même que cet écrit eût pu être considéré comme un transport à la banque, cette dernière n'ayant pas usé de la diligence voulue pour la perception de cette dette, et n'ayant pas fait signifier ce transport au débiteur, n'a aucune réclamation à exercer contre un cessionnaire subséquent qui, ignorant l'existence dudit transport, a acheté fadite dette par acte passé par-devant notaire et dûment signifié, et accepté par le débiteur par le paiement de sa dette à ce cessionnaire subséquent. (Banque de la Cité de Montréal et White et al., C. B. R., en appel, Montréal, 23 juin 1873, Duval, J. en C., DRUMMOND, J., BADGLEY, J., MONK, J., dissident, et TASCHE-

REAU, J., confirmant le jugement de C. S., Montréal, 30 avril 1872, MACKAY, J., 17 J., pp. 141 et 335, et 23 R. J. R. Q., p. 115.)

VENTE DE DROITS SUCCESSIFS. Une personne qui a acheté de droits successifs ne peut, dix ans après cette acquisition, être relevée des obligations qu'elle a contractées par l'acte d'acquisition, en prétendant que les droits qui lui ont été vendus lui appartenaient et que c'est par erreur et sans cause qu'ils lui ont été vendus; il y a lieu d'appliquer à ce cas l'art. 2258 C. C. (Roy dit Audy et vir vs Moreau et vir, C. S. R., Montréal, 30 décembre 1870, Mackay, J., Torrance, J., et Ramsay, J., confirmant le jugement de C. S., Montréal, 31 octobre 1870, Mondelet, J., 2 R. L., 715; 23 R. J. R. Q.,

DE LIQUEURS ENIVRANTES. "Si quelque personne tient une auberge, taverne, hôtel de tempérance, ou toute autre maison ou place d'entretien public," décrète la section 2 du ch. 2 de S. Q. de 1870, 34 Vict., "ou vend, ou troque en détail, de l'eau-de-vie, du rhum, whiskey ou quelque autre liqueur spiritueuse, du vin, de l'ale, de la bière, du porter, cidre ou autres liqueurs vineuses ou fermentées, ou en fait vendre, ou souffre qu'il en soit vendu ou troqué en détail dans sa maison ou ses dépendances, ou dans un bâtiment, barge, embarcation ou autre construction flottante ou amarrée dans une rivière, las ou cours d'eau, ou dans quelque maison, cabane, hutte ou autre bâtisse érigée sur la glace, sans la licence exigée par le présent acte, ou contrairement à son intention et à son sens véritables, telle personne encourra une amende de cinquante piastres pour chaque telle contravention, si elle est commise dans quelque partie organisée de cette province, et une amende de vingt-cinq piastres, si elle a lieu dans quelque territoire non-organisé et en dehors des limites d'une municipalité." La sec. 1^{re} décrétait que nul ne détaillera de liqueurs spiritueuses sans licence. Aux termes de la sec. 2, un individu ne peut, pour avoir vendu sans licen ce des liqueurs spiritueuses dans la maison d'un autre individu, être condamné à la pénalité qu'elle décrète. Il est vrai que, sous l'empire de la sec. 170, la livraison de liqueurs spiritueuses dans une taverne est déclarée être une violation des 1^{re} et 2° sections, mais cela ne permet pas à une partie qui poursuit pour la pénalité de le faire en d'autres termes que ceux mentionnés dans la 2e section. La condamnation doit décrire, conformément à la loi, la contravention pour laquelle elle est portée; autrement, elle est nulle. (Paige, req., et Grifith, intimé, C. S., Sherbrooke, 1873, SANBORN, J., 18 J., p. 119; 23 R. J. R. Q., p. 258.)
D'UN VAISSEAU ENREGISTRE. Par la loi de la province

D'UN VAISSEAU ENREGISTRE. Par la loi de la province d'Ontario, la vente faite par le shérif, dans ladite province, d'un vaisseau enregistré dans un port de la province de Québec et son adjudication à un créancier hypothècaire n'ont pas l'effet de purger ce vaisseau des hypothèques qui ont été consenties sur icelui, bien qu'elles soient postérieures à celle de l'adjudicataire. (Benning et al. et Cook. C. B. R., en appel, Montréal, 9 mars 1871, DUVAL, J. en C., CARON. J., BADGLEY, J., et MONK, J., confirmant le jugement de C. S., Montréal, 20 octobre 1869, Torrance, J., 2 R. L., 733; 1 R.

C., 241; 23 R., J. R. Q., 360.)

VENTE SUR ECHANTILLON. Dans une vente de marchandises sur échantillon, s'il est prouvé qu'une grande partie des marchandises ainsi vendues sont de qualité inférieure à l'échan-

ontréal, 30 avril 3 R. J. R. Q., p.

ui a acheté de actées par l'acté s qui lui ont été erreur et sans l'appliquer à ce Moreau et vir, C. J., TORBANCE, J., C. S., Montréal, ; 23 R. J. R. Q.,

personne tient ou toute autre e la section 2 du d, on troque en u quelque antre oière, du porter, entées, ou en fait troqué en détail dans un bâtiruction flottante s d'eau, ou dans atisse érigée sur orésent acte, ou sens véritables, cinquante piaselle est commise province, et une eu dans quelque s limites d'une nul ne-détaillera ax termes de la du sans licen ce n d'un autre indécrète. Il est la livraison de déclarée être une ne permet pas à de le faire en la 2º section. La à la loi, la contrement, elle est S., Sherbrooke, Q, p. 258.) oi de la province

of de la province ladite province, e la province de er hypothécaire typothèques qui ient postérieures t Cook. C. B. R.. en C., CARON. J., gement de C. S., R. L., 733; 1 R.

archandises sur partie des marrieure à l'échantillon, l'acheteur n'est pas tenu d'accepter la partie qui est de même qualité et peut répudier tout l'achat, par le motif que, le contrat étant un, il a droit à son entier accomplisement. (Desmarteau et al. vs. Harrey, C. S. R., Montréal, 28 février 1873, Mackay, J., Torrance, J., et Beaudry, J., confirmant le jugement de C. S., Montréal, 30 novembre 1872, Johnson, J., 17 J., p. 244; 3 R. C., p. 64, et 23 R. J. R. Q., p. 211.

p. 211.)
VENTE SUR ECHANTILLON. La montre d'un échantillon équivaut à l'affirmation que tontes les marchandi es vendues sont de même qualité que cet échantillon; si elles ne le sont pas, l'acheteur peut résilier le contrat. (Desmarteau et al. vs. Harvey, C. S. R., Montréal, 28 février 1873, Mackay, J., Torrance, J., et Beaudry, J., confirmant le jugement de C. S., Montréal, 30 novembre 1872, Johnson, J., 17 J., p. 244; 3 R. C., p. 64,

et 23 R. J. R. Q., p. 211.)

PUBLIQUE D'IMMEUBLES PAR UN SYNDIC. Illégale est la manière d'agir d'un syndic qui, procédant à la vente des biens immeubles d'un failli, les termes de paiement étant un quart du prix d'achat comptant à la passation de l'acte, c'est-à-dire quinze jours après la vente, refuse l'offre d'un enchérisseur sur un des immeubles mis en vente, à moins que ce dernier ne paie de suite une certaine somme, ce que cet enchérisseur ne peut faire, et adjuge cet immeuble à un autre enchérisseur; et, sur requête à cet effet, l'adjudication faite par lui sera cassée par la cour, et le dit immeuble adjugé à celui dont l'offre a été ainsi refusée. (Léger dit Parisien, failli, et Stewart, syndic, et Reither, req., C. S., Montréal, 30 janvier 1872, Mackay, J., 17 J., p. 84, et 23 R. J., R. Q., p. 108.)

p. 108.)
VOITURIER. A moins de convention contraire, le maître d'un navire n'est tenu, quant à l'emmagasinage, qu'à suivre les règlements et la coutume du port où il prend sa cargaison. (Winn vs Pelissier, C. S., Québec, 18 février 1871, Макепити, J. en C., 3 R. L., 32; 1 R. C., 246; 23 R. J. R. Q., p. 373.)

La livraison de bagage à un homme de police employé par une compagnie de chemin de fer, à l'une de ses gares, plusieurs heures avant le départ du train et en l'absence du gardien du bagage, est suffisante pour obliger la compagnie lorsqu'il n'est pas prouvé que le demandeur avait eu connaissance du règlement de la compagnie, qu'elle ne serait responsable du bagage que lorsqu'il serait contremarqué. (Tessier vs Le Grand-Tronc, C. C., Québec, 21 janvier 1871, TASCHERRAU, J., 3 R. L., 31; 1 R. L., 246; 23 R. J. R. Q., p. 372.)

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